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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit properly applied the substance of the strict scrutiny test in a Title VII/Equal Protection Challenge to a Government Employer's preferential hiring program.

2. Whether the Eleventh Circuit decision, which approved as narrowly tailored, a Governmental Employer's preferential hiring program, challenged under Title VII and Equal Protection, is in conflict with *Johnson v. Transportation Agency, Santa Clara Cty,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) and, *Regents of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) where (a) the program created a de facto quota, which segregated job candidates' employment test scores by race, sex and quasi-national origin to the detriment of the white male Petitioner, and (b) the program benefitted a loosely defined group labeled "Hispanic" which was not defined as a race or national origin but merely as a cultural or linguistic association, to the detriment of the white male Petitioner.

3. Whether the Eleventh Circuit decision approved of a flawed methodology in the Employer's determination of the existence of a manifest imbalance in its workplace when the court failed to require the statistical comparison of only that segment of the population that would actually qualify for employment.

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No. _____

In The

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October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alan A. Peightal, respectfully prays the Writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on September 4, 1991.

OPINION BELOW

The original panel decision of the Eleventh Circuit Court of Appeals was reported in *Peightal v. Metropolitan*

Dade County, 940 F.2d 1394 (11th Cir. 1991), decided September 4, 1991, and a copy of the opinion is included in the Appendix to the Petition.

JURISDICTION

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on September 4, 1991. This Petition for Writ of Certiorari has been filed within the allowable ninety days from that date. This Court's jurisdiction is invoked under Title VII of Civil Rights Act of 1964, 42 USC 2000 e et seq., The U.S. Constitution, Amendment XIV, 28 USC 1331, and 28 USC 1254.

CONSTITUTIONAL PROVISION

Amendment XIV United States Constitution:

> ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Alan Peightal applied for a position as a firefighter with the Metropolitan Dade County Fire Department. He

took the firefighter examination in October 1983 along with 3,300 other people. Peightal scored a 98.25 and earned a rank of 28 out of 2,188 persons who passed the test. Only 27 persons scored higher than Peightal on the examination. (A. 5, 6)

In 1983 the Fire Department was hiring pursuant to a minority preference program that called for the selection of female, black and hispanic applicants in what it referred to as "goals" to establish each respective group's representation on the department. (A. 6)

The Fire Department work force in 1983 was composed of 921 employees, of whom 74.9% were white, 11.8% were black, 13.8% were hispanic, and 1.3% were female compared to the general population. (A. 7)

The Department's long term goal was to "attain parity" with the Department's work force and the population. (A. 9 n.8) Metro Dade applied what it called the "70% rule" to establishing its numerical quantity in hiring "goals". The 70% rule was defined as: 'a significant disparity' between minority representation in the service population would be deemed to exist if the percentage of a particular group in the department was not at least 70% of that minority in the service population. (A. 10-11)

Metro Dade applied the 70% rule in 1983 and determined that its hiring goals for 1983 should include 44 whites, 23 blacks, 37 hispanics and 23 females. Accordingly, the Fire Department sought to achieve a rate of 33% white firefighters (70% of 47%) and 25% hispanic firefighters calculated from the fact that they made up 36% of the general population of Dade County; the Department set a goal of 37.1% for female firefighters since they

comprised 53% of the general population and a 12% "goal" for blacks who comprised 17% of the population. (A. 11 & 11 n. 10)

Once the applicants took the examination, their respective scores were grouped and ranked according to the following six categories: (i) black males (ii) black females (iii) white females, (iv) hispanic males (v) hispanic females and (vi) white males. All applicants were scored and ranked only against those other members of the category, eg., an hispanic male would only be ranked and compared against another hispanic male. The score of a white male, such as Peightal, would not be ranked against the score of any non-white male applicant. (A. 8).

Peightal was not hired and was taken off the "stand by" list of applicants in March 1986. He filed a complaint with the EEOC and on August 12, 1986 the EEOC denied Peightal's charge of discrimination, finding that Dade County acted in accordance with an affirmative action plan. On November 21, 1986, Peightal filed a complaint under 42 U.S.C. Section 1983 and Title VII of the Civil Rights Act of 1964 against Metropolitan Dade County seeking injunctive relief against Dade County for its preferential hiring, and back wages from the time period which he should have been hired had the discriminatory practice not been in effect.

A non-jury trial was held in January 1988 on the issue of discrimination liability only, the issue of damages was severed and reserved for a later date upon the resolution of liability. The court found against Peightal in April 1988 and Peightal appealed. On September 4, 1991 the Eleventh Circuit Court of Appeals found that it was "divided"

on the question of whether *City of Richmond v J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) required remand to the district court to determine whether there was a violation of the equal protection clause and held that the affirmative action plan was valid under Title VII, but remanded the case for determination as to the plan's validity under the *Croson* analysis of strict scrutiny under the equal protection claim.

REASONS FOR GRANTING THE WRIT

A. THE STRICT SCRUTINY STANDARD OF REVIEW OF THE EQUAL PROTECTION CLAUSE, IS NECESSARILY INTERRELATED TO ANY ANALYSIS OF THE CONSTITUTIONALITY OR LEGALITY OF A PUBLIC MINORITY PREFERENCE PROGRAM INSTITUTED UNDER THE STATUTORY PARAMETERS OF TITLE VII, IN CONFORMITY WITH THIS COURT'S DECISION IN *CROSON*.

There is an apparent conflict as to the standard of review which the *Croson* decision actually demands from the lower courts in their analysis of any race or national origin based preference program under the rubric of a Title VII affirmative action plan. The majority in the Eleventh Circuit below decided that a Title VII/Equal Protection claim necessarily involved a strict scrutiny analysis. (A. 17). However, the Eleventh Circuit applied the strict scrutiny test in name, but not in substance. Effectively the court applied a slightly higher form of the less restrictive rational basis test.

There appears to be a plurality consensus from the *Croson* opinions that strict scrutiny applies to all governmental classifications of race; however, it remains an issue with which the Circuit Courts must struggle, since it is not clearly declared by the *Croson* plurality as applying under a Title VII context. Thus, it is of great public importance that the Court assist in answering this crucial issue. Any racial or ethnic preference by a governmental entity whether under a Title VII or a Fourteenth Amendment challenge, necessarily involves the Equal Protection clause and cannot be considered mutually exclusive of the other when applying a standard of review. An act of discrimination by a government employer cannot be legitimate under Title VII if it is illegitimate under the Equal Protection clause. Title VII must be read with the presumption that congress did not intend to authorize conduct that is prohibited by the Constitution. See, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979)

The Eleventh Circuit opinion failed to give sufficient weight to the constitutionally deficient characteristics of the Respondent's affirmative action program reflecting the confusion among the circuits as to how strict scrutiny should apply in the public minority preference programs; as the court noted in a footnote, "a majority on the court for the first time has settled on a single standard – the strict scrutiny test." (A. 14 n. 14 and A. 17). The Eleventh Circuit effectively expressed its difficulty with how to apply some identifiable principles from *Croson* to a government sponsored voluntary affirmative action program in its statement that "the lower federal courts have had to

struggle to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations". (A. 16-17). Thus, there is uncertainty over just how far the governmental employer could go in its implementation of an affirmative action program and what test and limitations should be applied in light of *Croson*.

The proper test to apply in this case should have been the strict scrutiny standard, as the majority apparently did; however it failed to actually apply it in substance. The Eleventh Circuit approved of the program below despite the fact that there was no showing by the Employer of past discrimination against the specific groupings, or categories of people, which benefited from the preferential hiring plan. The Employer's plan placed people into specific groups in order to prevent competition among the other applicants, and thus assured the admission of the chosen class members under the illusion of open and free competition. *Croson* required that the employer point to evidence that the qualified minorities were passed over for work, either as a group or individually. Without such evidence, *Croson* stands for the proposition that it is impossible to say the employer demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary". *Croson*, 109 S.Ct. at 730, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 277, 106 S.Ct. at 1848. There is no evidence in the decision below that the Employer could even properly classify or discern some of the members of the groups to which it would extend preferential hiring benefits.

Justice O'Connor has spoken of the purpose of strict scrutiny as a device to "smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 109 S.Ct. at 721. Moreover, Justice Kennedy reasoned in his concurring opinion in *Croson* that the strict scrutiny test will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use of even narrowly drawn racial classifications, except as a last resort. "Any racial preference must face the most rigorous scrutiny by the courts." *Croson*, 109 S.Ct. at 734. (Kennedy, J., concurring) Justice Scalia made clear the question of what test to apply to race conscious preferential programs when he stated that "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is remedial or benign." *Croson*, 109 S.Ct. at 735. (Scalia, J., concurring)

B. THE ELEVENTH CIRCUIT MAJORITY INCORRECTLY VALIDATED, UNDER A TITLE VII – STRICT SCRUTINY ANALYSIS, THE PREFERENTIAL HIRING PROGRAM WHICH WAS NOT NARROWLY TAILORED IN ITS IMPLEMENTATION OF DE FACTO QUOTAS IN CONFLICT WITH THE REASONING IN *UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) AND *JOHNSON v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

It is of great public importance that this Court define and narrow the distinction between a "goal" and an

unacceptable "quota" in light of the Court's decision in *Bakke* and *Johnson*.

The Eleventh Circuit approved of Respondent's program despite the fact that it created a de facto quota by segregating the competitors into groups and by creating a group loosely classified as "Hispanic", which was not a race or national class and had not been shown to have been subjected to past discrimination.

This Court has held that an employer may respond to perceived discrimination by developing a "narrowly tailored" affirmative action plan that addresses actual discrimination, not societal discrimination. *Wygant v. Jackson Board of Education*, 467 U.S. 267, 106 S.Ct. 1842, 1872, 90 L.Ed.2d 260 (1986). An affirmative action program can only validly remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination. See *United States Steelworkers of America v. Weber*, 433 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d. 480 (1979).

There must be a finding that the plan was implemented to remedy the existence of a "manifest imbalance" in a "traditionally segregated job category". *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). And, it must be determined if the plan has "unnecessarily trammeled" the rights of an innocent party. *Id.* A requirement of evidence of past effects of racial discrimination by the government employer as a prerequisite for establishing a preferential hiring plan is the apparent plurality view in *Croson*, 109 S.Ct. at 729.

In the case at hand the Respondent governmental employer applied its 70% rule in determining the percentage and composition of its workforce. It determined an actual hiring of 25% hispanics, calculated from the fact that they made up 36% of the general population of Dade County, 12% for blacks who comprised 17% of the population, 37.1% of females who comprised 53% of the general population and 33% of white males who made up 47% of Dade County. (see A. 11 n. 10). A total of 24 hispanic males, 4 hispanic females, 18 black males, 5 black females, 12 white females, and 23 white males were actually hired as a result of the 1983 examination (see A. 11). Out of the total of 86 persons hired, 51 persons actually scored lower than Peightal. (A. 11). Only 27 persons out of 2,188 persons who passed the test, scored higher than Peightal. (A. 6 n. 3).

As the Eleventh Circuit Court correctly explained, Peightal was never in competition with those persons who were not of the white male category. His score, for example, was never matched with the 28 hispanic males and females actually hired and he was therefore, denied his opportunity to a fair chance at the job. (A. 8). There was in effect a de facto quota assuring white males would not be allowed to fairly compete with all other competitors for available jobs.

The Court in *Johnson* specifically emphasized in its affirmance of that particular affirmative action plan, that the plan set aside no positions for the protected group (women in that case); additionally the approved plan in *Johnson* did not automatically exclude qualified males from consideration, in fact, the plan was upheld because it did not insulate individuals from comparison with all

other candidates for available seats. Competitors were able to have their qualifications weighted against those of other applicants. *Johnson*, 480 U.S. at 639, 107 S.Ct. at 1455.

The Eleventh Circuit, therefore disregarded the *Johnson* reasoning when it approved the Respondent's affirmative action plan. The simple act of changing the name of an act which is forbidden does not change the nature of the act. When the Respondent implemented its six categories of racial and ethnic groupings, insulating them from competition, it effectively set aside jobs in a de facto quota form. The factual results, as the Eleventh Circuit Court accepted, were 28 "hispanic" jobs, 23 "black" jobs and 12 "white female" jobs; selected separately from the 23 "white male" jobs. (A. 8).

An affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of proportionate representation by race or sex would violate Title VII. *Johnson*, 480 U.S. at 654, 107 S.Ct. at 1464 (O'Connor, J., concurring). The "goal" in an approved affirmative action plan merely authorizes that consideration be given to affirmative action concerns when considering qualified applicants. The plan in *Johnson* was approved because it resembled the "Harvard Plan", noted by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 316-319, 98 S.Ct. 2733, 2761-2763, 57 L.Ed.2d. 750 (1978). In other words, the successful "goal" uses race or national origin as a factor or consideration and not as a badge of preference. As Justice Powell observed in approving the "Harvard Plan": " . . . race or ethnic

background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.*, 438 U.S. at 316-319, 98 S.Ct. at 2761-2763.

A total of 28 of the 86 jobs awarded went to those persons labeled as "Hispanic", a group which did not include identifiable racial or ethnic characteristics, and which could not be shown to have been the subject of actual past discrimination in the Respondent's workforce. Thus Peightal was displaced and denied an opportunity for at least 28 jobs that were handed out on a preferential basis to a group that only had to "culturally or linguistically identify" with the classification. (A. 42)

It has been held that an absolute preference based on race is not a narrowly tailored means of remedying past discrimination. See, *Bakke*, supra, and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). The case at issue is an example of preference based on even less than race or national origin. This case is an example of preference based upon identifiability with a cultural origin.

The Eleventh Circuit majority has incorrectly expanded the scope and meaning of "goal" to the facts herein and effectively resuscitated and approved the quota system in conflict with the reasoning in *Johnson*, *Bakke*, and *Croson*.

B(i). THE ELEVENTH CIRCUIT MAJORITY DECISION VALIDATED AN AFFIRMATIVE ACTION PROGRAM IN CONFLICT WITH THE CROSON DECISION BECAUSE THE PROGRAM FAVORED HISPANICS; AN AMORPHOUS AND LOOSELY DEFINED GROUP, WHICH COULD NOT BE CLEARLY DEFINED IN EITHER RACIAL OR ETHNIC TERMS IDENTIFYING THE SPECIFIC DISABILITY JUSTIFYING PREFERENTIAL TREATMENT.

It is of great public importance to determine the meaning and standards by which a government employer can deny one person a job in order to provide one for another based on some general classification that fits, neither under the racial, nor the national origin rubric. The courts have been unclear as to the extent to which "Hispanics" as a class can obtain preferential treatment absent some quantifiable racial or ethnic characteristic, supported by actual past discriminatory treatment. It is important for this court to address and clarify the extent to which the governmental employer can prefer such a group to the detriment of Peightal's right to Equal Protection, and still be consistent with the requirement that such programs be narrowly tailored in conformity with *Johnson*.

When government creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, such particular identification is imperative. *Croson*, 109 S.Ct. at 733, 734 (Stevens, J., concurring) (quoting *Fullilove* at 552, 554, 100 S.Ct. at 2813-2814).

The plan as validated by the Eleventh Circuit permits persons without identifiable features to receive preferential consideration. "Hispanic" as defined by the EEOC includes: "All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, *regardless of race*" (A. 42) (emphasis added)

The Eleventh Circuit incorrectly found that the Respondent's plan was not both over and under inclusive in its application to "Hispanics". In effect, the plan in question specifically grants preference to a group which cannot be identified as a race or nationality and which is not shown to have been the subject of any actual past discrimination. Effectively such a preference is equivalent to granting a preference to those who identify as "Anglo Saxon." The linguistic and cultural ambiguity is equally broad in scope.

The Eleventh Circuit questioned Peightal's standing to challenge the definition and composition of the category of "Hispanic" despite the fact that it is uncontroverted that he had been denied a job and 28 hispanic persons were hired, precisely because of the EEOC defined affirmative action plan in effect. It has been held that standing exists for those persons who are personally denied equal treatment by the challenged discriminatory conduct. *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 3315, 3326, 82 L.Ed.2d 556 (1984). Standing exists for any person who is denied opportunity to compete for positions because of race. *Bakke*, 438 U.S. at 280 n.14, 98 S.Ct. at 2743 n.14.

The Eleventh Circuit acknowledged that "it may seem anomalous to grant employment preferences to a

light skinned descendent of Spanish grandparents who speak no Spanish and has no cultural ties to an American Spanish community or to Spain." (while denying such preferences to Portuguese-speaking offspring of Portuguese parents) However, the Eleventh Circuit erroneously reasoned that such a situation would not arise under the Metro Dade Plan, because the Plan adopts the EEOC requirement that a person's claim of identification with a certain racial or ethnic group *"should* accompany strong visible indication that the person culturally and linguistically identify with the group he or she claims". (A. 42). Just what *"should* accompany" and *"culturally* and *linguistically identify"* means as a standard is a crucial point which the Eleventh Circuit disregarded in its analysis of the program's narrow tailoring; moreover, the extent and parameters of the EEOC term "Spanish culture or origin" is not defined, but left to the whim of individual employers to interpret at Peightal's expense.

C. THE ELEVENTH CIRCUIT MAJORITY DECISION INCORRECTLY APPROVED A FLAWED METHODOLOGY IN CONCLUDING THAT THERE WAS A MANIFEST IMBALANCE IN JUSTIFYING THE IMPLEMENTATION OF THE AFFIRMATIVE ACTION PROGRAM, IN CONFLICT WITH THE ESTABLISHED PRECEDENCE OF THIS COURT REQUIRING THE EMPLOYER TO STATISTICALLY COMPARE THE SEGMENT OF THE POPULATION THAT ACTUALLY QUALIFIES FOR THE AVAILABLE EMPLOYMENT.

The Eleventh Circuit should have based its decision on the analysis delineated in Chief Judge Tjoflat's dissent. The dissent argued that the court should not have relied

on general population figures of minorities in Dade County and compared these figures with the percentages of minorities employed as firefighters in determining whether the disparities justified an affirmative action plan. (A. 48-49)

The dissent correctly found that general population figures did not accurately reflect the pool of qualified job applicants. (A. 49) As the dissent pointed out, "the district court, and the majority ignored evidence of the Dade County Fire Department's minimum requirements for entry level firefighters, particularly age restrictions" (A. 49). By the court's failure to take these restrictions into account it effectively calculated a large segment of the Dade County population which would not be eligible for the entry level positions. (A. 49-50) The proper review should have been a comparison of the Respondent's work force to that segment of the Dade County population that would qualify for positions as entry level firefighters.

In a similar statistical situation, the Seventh Circuit Court of Appeals held that any proffered statistical comparison must establish a manifest imbalance between the relevant qualified area labor pool and the employer's work force. *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 109 S.Ct. 1310 (1989). Absent such a statistical comparison there can be no assurance that race is being taken into account" in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination". See, *Johnson* 107 S.Ct. at 1452. The Seventh Circuit found that if a job category required that applicants possess minimum qualifications, the Employer's statistical comparison must

narrow its focus to those actually qualified for the positions. *Janowiak,* supra.

In the case below, the dissent correctly found that the majority opinion validated the district court's "clearly erroneous methodology, at the risk of affirming an unlawful affirmative action plan and at the expense of appellant's (Peightal) claim of racial discrimination" (A. 51). The Eleventh Circuit majority decision as it applies to the methodology used in determining the need for an affirmative action program is in conflict with this Court's recent decision in, *Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977), which defined the parameters by which the employer's statistical base could be drawn. The labor market must be narrowed to only those persons with undisputed qualifications for the job and *Wards Cove Packing Co. Inc. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Consequently it is of great public importance that this Court more clearly define the proper method by which an affirmative action program could be constitutionally implemented and narrowly tailored to include only those persons subject to the past harms referred to in the *Hazelwood, Wards Cove Packing Co.,* and *Croson* decisions.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a Writ of Certiorari to review the decision by the Eleventh Circuit Court of Appeals as

the Eleventh Circuit Court of Appeals ignored or misapplied precedent of this Court and ruled erroneously.

DATED: Miami, Florida
November 25, 1991

Respectfully submitted,

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United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 88-5496

D.C. Docket No. 86-2350-CIV-ALH

ALAN A. PEIGHTAL,

Plaintiff-Appellant,

versus

METROPOLITAN DADE COUNTY
METROPOLITAN FIRE DEPARTMENT OF
DADE COUNTY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and BROWN*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, siting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and VACATED in part; and that this cause be and the same is hereby REMANDED to said District Court for consideration in light of *City of Richmond v. J.A. Croson Co.*;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

TJOFLAT, Chief Judge concurred in part and dissented in part and filed an opinion.

JOHNSON, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: September 4, 1991
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: OCT 16 1991

Alan A. PEIGHTAL,
Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY, Metropolitan Fire Department of Dade County, Defendants-Appellees.

No. 88-5496.

United States Court of Appeals,
Eleventh Circuit.

Sept. 4, 1991.

Alexander Kapetanakis, Miami, Fla., for plaintiff-appellant.

John McInnis, Dade County Attorney's Office, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and BROWN*, Senior Circuit Judge.

JOHN R. BROWN, Senior Circuit Judge:

Foreword

As the Court is divided on the question of whether *Croson* requires remand to the District Court to determine whether there is a violation of the Equal Protection

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*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Clause, this opinion[1] is constructed sharply to delineate the difference.

The Court is together on Parts I, II and III. In Part IV, the Court parts company. Judge Brown, in what is essentially his dissenting opinion, articulates why he is of the opinion that a remand on Equal Protection is not necessary and why, if *Croson* applies to determination of Title VII, *Croson* is fully met. Chief Judge Tjoflat and Judge Johnson do not concur in Part IV, believing as they do that determining whether under *Croson* the Metro Dade plan violates the Equal Protection Clause, should be remanded to the District Court for its consideration in light of *Croson*. Chief Judge Tjoflat, concurring with Judge Johnson, writes additionally.

Judge Brown and Judge Johnson agree on Part V that the plan is not invalid under Title VII. Chief Judge Tjoflat dissents separately on this part. The result is that the judgment of the District Court on Title VII is affirmed. The question whether under *Croson* the plan violates the Equal Protection Clause is remanded.

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[1] For historical precedent for this appellate opinion procedure see *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 546, 55 (5th Cir. 1959); *United States v. DeWitt*, 265 F.2d 393, 394, 401 (5th Cir. 1959); *Canal Insurance Co. v. Dougherty*, 247 F.2d 508, 509, 513 (5th Cir. 1957). *Cf. Louisiana Power & Light Co. v. FPC*, 483 F.2d 623, 624, 632 (5th Cir. 1973); *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1023 (5th Cir. 1969); *see also, Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 239 n. 33 (5th Cir. 1976); *Wallace v. House*, 515 F.2d 619, 637 (5th Cir. 1975); *EEOC v. Internat'l. Longshoremen's Ass'n.*, 511 F.2d 273 (5th Cir. 1975); *United States v. Register*, 496 F.2d 1072, 1076 n.1 (5th Cir. 1974); and *Nathaniel Shipping Inc. v. General Electric*, 920 F.2d 1256 (5th Cir. 1991).

Introduction

Alan Peightal (Peightal) brings an individual (non-class action) reverse discrimination claim against appellee Metropolitan Dade County (Metro Dade) because the Dade County Fire Department (Fire Department or Department) hired minorities who scored lower than Peightal on the applicant exam, but did not hire Peightal. When Peightal applied for a job as a firefighter, the Fire Department was hiring pursuant to an affirmative action plan (Plan) which sought to redress a statistical imbalance between the percentage of minorities[2] in the Department and the percentage of minorities in the general population. The district court upheld the Plan against Peightal's claim that it violated Title VII and the Equal Protection Clause of the United States Constitution. We affirm in part; vacate and remand in part.

I.

Facts and Proceedings Below

On October 18, 1983, Peightal, a white male, applied for a position as a firefighter with the Fire Department. Peightal took the firefighter examination in October of 1983 along with 3,300 others. Peightal's score of 98.25

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[2] Throughout this opinion, we use the term "minorities" to include women.

earned him a rank of 28 out of 2,188 persons who passed the test.[3]

As the trial court found, when Peightal applied in October 1983, the Fire Department was hiring pursuant to a minority preference program that called for the selection of female, black and Hispanic applicants in accordance with certain goals established for the purpose of increasing the representation of these groups. Before adopting the Plan, Metro Dade[4] conducted an analysis of

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[3] Both the appellant's brief and the district court state that Peightal's test score placed him in the "28th percentile" of applicants. This is misleading, but ironically it is misleading disadvantageously to Peightal. In fact, there were only 27 persons who scored higher than Peightal on the examination. The normal understanding of a 28th "percentile" ranking would have meant approximately 613 people did better than Peightal (28% of 2,188). Obviously, this is a significant difference.

[4] Metropolitan Dade County is a sovereign entity comprehending specific powers as to the 26 municipalities and the unincorporated area within the geographical boundaries of the county. The Florida Constitution provides:

> The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body.

See Constitution, State of Florida, Home Rule Amendment Relating to Dade County, Art. VII, Sec. 11 (adopted Nov. 6, 1956)

The *Home Rule Charter for Metropolitan Dade County,* (Official Records Book 182, p. 667, Public Records of Dade County,

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the Fire Department's work force which revealed that in 1965 the Department employed 121 firefighters, all but one of whom were white males, compared to a general population that was 69% white, 15% black, 16% Hispanic and 52% female. By 1975, the Fire Department had grown to 499 firefighters, of whom 89% were white, 8% were black, 3% were Hispanic and none was female, compared to a general population that was 52% white, 16% black, 32% Hispanic and over 50% female. By 1983, when the Plan at issue herein was implemented, the number of firefighters in the Department had increased to 921, of whom 74.9% were white, 11.8% were black, 13.8% were Hispanic and 1.3% were female, compared to a general population that was 47% white, 17.3% black, 35.8% Hispanic and over 50% female.[5]

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Florida) (adopted May 21, 1957), provides that the "Board of County Commissioners shall be the legislative and the governing body of the county and shall have the power to carry on a central metropolitan government." *Id.* Art. I, Sec. 1.01. This power includes, (as a partial list), the power to (i) provide a uniform system for fire and police protection, (ii) provide and regulate roads, bridges, tunnels and related facilities, (iii) provide and operate air, water, rail and bus terminals, port facilities, and public transportation systems; (iv) license and regulate passenger vehicles for hire operating in the county; (v) levy and collect taxes and special assessments; and (vi) establish, merge and abolish special purpose districts within which may be provided fire protection, among other services. *Id.*

[5] The percentage of Hispanics has increased markedly since 1965. As the percentage of Hispanics has risen, the percentage of whites has fallen.

The district court found that once the applicants took the examination, their respective scores were grouped and ranked by the applicants' particular classification as defined by the Fire Department pursuant to the Plan. The following six categories were used: (i) Black Males, (ii) Black Females, (iii) White Females, (iv) Hispanic Males, (v) Hispanic Females, and (vi) White Males. All applicants were scored and ranked only against those other members of the category. For example, a Black Male's test score would be ranked only against the score of another member of the class of Black Males taking the examination; the score of a White Male applicant such as Peightal would not be ranked against the score of any non-"White Male" applicant.

The district court found that although the position of firefighter is described as "specialized work in the protection of life and property" the position is nevertheless an "entry-level" one, as "there are no specialized skills per se which must be possessed in order to obtain the posi tion."[6] Accordingly, the trial court ruled that "a comparison

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[6] To become a firefighter, candidates must:

possess a high school diploma or its equivalent

possess a driver's license and have the ability to obtain a chauffeur's license

be at least 18 years old

pass a physical capabilities test

pass a medical examination

pass a personal interview

have corrected vision in both eyes of at least 20/40

between the Fire Department's work force and the labor market is appropriate."[7]

The stated long-term goal of the Department's Plan was "to attain parity [between the Department's work force and] the population."[8] The Plan made a distinction between two kinds of employees for the purpose of determining hiring goals. For professional and administrative positions, Metro Dade sought to achieve the same percentage of female and minority employees as existed in

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[7] The trial court implicitly equates the labor force with the general population. As will later become clear, the Supreme Court allows this equivalency to be assumed for unskilled positions.

[8] Phrasing the goal of the Plan in terms of "racial parity" treads on thin constitutional ice. *See Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 494, 106 S.Ct. 3019, 3059, 92 L.Ed.2d 344, 399 (1986) ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination"), (O'Connor, J., concurring in part and dissenting in part), quoted with approval in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508, 109 S.Ct. 706, 729, 102 L.Ed.2d 854, 891 (1989) (majority opinion); *see also Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 912 (D.C.Cir.1989) (Silberman, J., concurring) ("Governmentally-imposed minority preferences are constitutionally permissible under certain limited circumstances, but they may not be based on the desirability *per se* of achieving racial balance or proportional representation of minorities in selected institutions"), *reversed sub nom., Metro Broadcasting, Inc. v. FCC*, ___ U.S. ___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990).

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the available qualified labor force.[9] For the other category of employees, which included Protective Services (fire-fighters), Para-Professionals, Office Clerical, Skilled Craftsmen and Service Maintenance, the Plan called for the usage of a "70% rule." According to the Metro Dade "Affirmative Action Policy and Statement: Goals and Timetables:"

> [e]ssentially what the 70% rule says is that a *significant disparity* between minority representation in the service population, in our case, that

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As will be discussed more fully, *infra*, voluntary affirmative action plans must seek to remedy past discrimination to survive constitutional challenge under the strict scrutiny standard. Redressing the significant underrepresentation of minorities in the place of employment is a legitimate goal for an affirmative action plan, as we shall see. Thus, while the remedial action taken by the Metro Dade fire department may, for practical purposes, be initially identical whether the goal is framed as "seeking racial parity" or "redressing prior discrimination," it would behoove those employers drafting affirmative action plans to use language which mirrors the constitutional requirements.

[9] For example, in 1983 there were 65,935 residents of Dade County considered by the profession to be managers or administrators. White Females were 8,294 for a 14.6% total, Black Males 1,399 for a 2.4% total. Goals established for each Dade County department and agency would be based upon the minority/female representation in the labor force. Thus, the Metro Dade "Affirmative Action Policy Statement: Goals and Timetables" brochure stated: "14.6% for White females, 2.4% for Black males should be the representation of these two groups in your department in the official administrative position. We do not address the constitutionality of the Plan as it relates to professional and administrative positions.

is Metro Dade's departments and divisions, may be deemed to exist if the percentage of a particular minority group in the department/agency is not at least 70% of the percentage of that minority in the service population. Our emphasis.)

Applying the 70% rule to Metro Dade population statistics, the Fire Department determined that its hiring goals for 1983 should include 44 whites, 23 blacks, 37 Hispanics, and 23 females.[10] As a result of the Department's hiring from the 1983 examination, the following recruits were hired from 1983 to 1985: (i) 23 White Males, (ii) 12 White Females, (iii) 18 Black Males, (iv) 5 Black Females, (v) 24 Hispanic Males, and (vi) 4 Hispanic Females. The total figure hired was 86 persons; and 51 of these scored lower than Peightal on the 1983 examination. Nevertheless, Peightal was not hired.

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[10] In detailing goals and population figures, sometimes the Fire Department separates each of the three racial/ethnic categories (blacks, Hispanics, whites), into two gender categories, for a total of six. At other times, males and females within a racial/ethnic category are lumped together, and then overall percentages of males and females are provided.

In 1983, the Plan listed the following goals for its firefighter population. There were 754,443 white persons in Dade County in 1983, which represents 47% of the population. Accordingly, the Fire Department sought to achieve 33% white firefighters (70% of 47%). For blacks, who comprised 17% of the population, (280,434 total), the sought for figure was 12.1%. Hispanics made up 36% of the population of Dade County, (580,994 total), so the Fire Department wanted to achieve 25% Hispanic firefighters. Finally, the Fire Department set a goal of 37.1% female fighters, because women comprised 53% of the total population.

In March of 1986, Peightal found out that he had been taken off the "stand by" list of applicants and had not been hired due to the Plan. Peightal filed an Equal Employment Opportunity Commission (EEOC) Complaint alleging racial discrimination. On August 12, 1986, the EEOC denied Peightal's charge and found that Metro Dade's actions were done in accordance with an affirmative action plan but issued Peightal a "right to sue" letter which permitted him to file this present suit.

On November 21, 1986, Peightal filed a complaint under 42 U.S.C. § 1983[11] and Title VII of the Civil Rights Act of 1964 against Dade County and the Department. Peightal sought injunctive relief against Dade County for its preferential hiring treatment of minorities, and back wages from the time period which he should have been

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[11] Section 1983 provides in relevant part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity or other proper proceeding for redress. * * *

42 U.S.C. § 1983 (1988). Peightal alleged the violation of both Title VII and the equal protection clause as the predicate for his claim for recovery under § 1983. Because § 1983 secures no substantive rights of its own, our affirmance of Peightal's Title VII and remand of his constitutional claims are dispositive also of his action under § 1983.

hired had Dade County's hiring practices not been in effect.[12]

On December 19, 1986, Metro Dade[13] filed its answer alleging its dependence and reliance upon the Plan and offered the specific defense that the denial to Peightal of any position of employment was due to its "legitimate affirmative action program," and that Dade County was exempt from liability on the ground that it adopted the EEOC regulations for the challenged Plan. Metro Dade also asserted that 42 U.S.C. § 1983 was not a valid remedy when the Title VII remedy was available and that Peightal had not timely filed his claim under Title VII for discrimination.

A non-jury trial was held in January 1988 with the issue of damages to be determined at a later date after the liability issues were determined.

In April 1988, Peightal appealed the judgment in favor of Metro Dade.

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[12] Peightal initially had also sued under the "Vietnam Preference Act" and "Vietnam Era Veterans' Readjustment Assistance Act of 1974," but dropped such claim for relief before trial and tried the case solely on the issues of discrimination under 42 U.S.C. § 1983, Title VII, and the Fourteenth Amendment to the United States Constitution.

[13] The "Metropolitan Fire Department of Dade County," did not file an answer, although it was an originally named defendant, because the legal entity responsible for fire service in the county is Dade County. Accordingly, on appeal, the sole appellee in this case is Metro Dade.

II.

The Constitutionality of Government Sponsored Minority Preference Programs

On January 23, 1989, the Supreme Court issued its landmark *Croson* decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) on the constitutionality of government-sponsored minority preference programs.[14] Since the district court handed down the opinion in the case *sub judice* on April

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[14] The significance of *Croson* is revealed by the gathering of thirty of the nation's most prominent constitutional scholars shortly after the opinion was made public for a conference in Boston to discuss the import of the decision and to issue a statement in response. *See Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 Yale L.J. 1711 (1989). Challenging what he regarded as "spin control" by these scholars and law school deans, Charles Fried, then Solicitor General, parried with his own comments, and asserted that their statement "adopts the tone at once of Chicken Little and Dr. Pangloss: Something terrible has happened, but it's not so bad after all." Fried, *Affirmative Action after City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 Yale L.J. 155 (1989). Fried's analysis provoked a counterattack by the thirty scholars. *Scholar's Reply to Professor Fried*, 99 Yale L.J. 163 (1989).

There should be little doubt that *Croson* is indeed a weighty decision. The most extensive response to *Croson* so far, Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich.L.Rev. 1729 (1989), asserts that "a majority on the Court for the first time has settled on a single standard – the strict scrutiny test," *id.* at 1731, and concludes that the case is a "turning point," *id.*, and "of considerable importance." *Id.* at 1793.

25, 1988, it was obviously unable to give detailed consideration to *Croson*. On appeal, however, it is our duty to apply the law as it exists when we deliver our opinion, even if it has changed since the time of a lower court decision.[15] *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 526, 21 L.Ed.2d 474, 483 (1969). *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784, 796 (1981). Since, before *Croson*, a majority of the Supreme Court had never joined in one opinion[16] on the

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[15] The appellate briefs also predate *Croson*, since the case was heard on appeal less than a month after *Croson* was issued.

[16] *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (equal protection reverse discrimination claim brought by white school teachers with greater seniority who were laid off pursuant to a collective bargaining agreement to protect the jobs of minority teachers with less seniority in order to preserve gains in minority teacher recruitment); *Fullilove v. Klutznick*, 448 U.S. 48, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (constitutional challenge to a federal statute enacted by Congress pursuant to its authority under the commerce clause, § 5 of the Fourteenth Amendment, and Congress's taxing and spending power; the statute set aside 10% of funds for minority business enterprises); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (equal protection reverse discrimination challenge to a state medical school's admissions policy that reserved 16 out of 100 seats exclusively for minority group members). These three decisions produced 17 different opinions.

constitutionality of government-sponsored voluntary affirmative action programs,[17] the lower federal courts

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[17] In addition to these three decisions, n. 16, *supra*, on the *constitutionality of voluntary* affirmative action programs, the Supreme Court had issued six major decisions on the legitimacy of affirmative action plans in cases involving Title VII or court-ordered programs. For ease of reference, each of these six cases is fully cited below followed by a brief description of its facts. *Johnson v. Transportation Agency, Santa Clara County, Cal*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (Title VII reverse discrimination claim brought by a male who was passed over for a promotion to a road dispatcher's job in favor of an arguably less qualified woman); *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed 2d 203 (1987) (equal protection reverse discrimination claim brought by white state troopers challenging a judicially imposed 50/50 promotion plan implemented following the district court's finding of egregious discrimination; the quota was actually used only once); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) (Title VII reverse discrimination claim by white firefighters challenging a consent judgment entered into by the city and a black firefighter association which called for promotion quotas); *Sheet Metal Workers' Int'l Ass'n v. EEOC, supra*, (Title VII reverse discrimination claim brought by a union objecting to a judicially-imposed 29% membership goal, following the district court's findings of persistent, egregious discrimination); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483, (1984) (challenge by a fire department and firefighters' union to a district court order modifying, over their objection, a consent judgment in order to prevent the layoff of recently hired minority firefighters; the minority firefighters were originally hired to settle a Title VII action alleging discriminatory hiring and promotion practices); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (Title VII reverse discrimination claim against a private employer challenging the establishment of a training program that limited its enrollment to 50 percent white trainees, reserving 50 percent of its enrollment for black trainees).

have had to struggle[18] to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260, 266 (1970).

In *Croson*, a majority of the Court finally agreed that the constitutionality of a state or local public minority preference program must satisfy a strict scrutiny standard. Because of the complexity of the issues involved the uncertainty surrounding some of the precedential authority, and the relatively untested nature of the recent – and only majority – Supreme Court decision on the subject, it will be helpful to discuss in some detail the facts and holding of *Croson*.[19]

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[18] One commentator described the opinions in these nine cases, nn. 16 and 17, as follows:

> The opinions in these nine (Supreme Court) cases are lengthy, incohesive, contradictory, and ambiguous. They occupy over five hundred fifty-four pages in the official reporters and consist of forty-six majority, plurality, concurring, and dissenting opinions. Even within a single case, it is often impossible to discern the Court's holding because not every Justice in the majority will endorse the entire majority opinion. Often there is no majority opinion, only a plurality opinion.

Daly, *Some Runs, Some Hits, Some Errors – Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 Boston College Law Review 1, 5 (1988).

[19] For a good discussion of the principles governing the constitutionality of voluntary affirmative action programs, *see Shurberg Broadcasting*, 876 F.2d at 910-12 (Silberman, J., concurring), which gleans some "general propositions" from the four relevant cases, *Croson*, *Bakke*, *Fullilove*, and *Wygant*.

III.

City of Richmond v. J.A. Croson Co.

There are six separate opinions in *Croson*. Justice O'Connor authored the plurality opinion and was joined to form a majority in Parts, I, III-B, and IV of her opinion. Justices Stevens, Kennedy, and Scalia wrote separate concurring opinions, and Marshall and Blackmun filed dissenting opinions.[20] Because Parts I, III-B and IV of Justice O'Connor's opinion form the binding precedential core of *Croson*, we will devote our attention to that portion of the decision. Technically, we are not bound by those opinions (or portions of opinions) of the Supreme Court that do not carry a majority of Justices, although such opinions are obviously of persuasive quality. *See Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1292 n. 11 (11th Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989); *Coral Const. Co. v. King Courty*, 729 F.Supp. 734, 738 (W.D.Wash.1989).

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[20] An exceptionally thorough discussion of the *Croson* opinion appears in *Cone Corp. v Hillsborough County*, 723 F.Supp. 669 (M.D.Fla. 1989), *rev'd*, 908 F.2d 908 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990), which breaks the opinion down into its various sections for analysis. The careful reader, however, will note the unfortunate mistakes made in *Cone* describing which Justices joined in the various opinions and sections. For example, *Cone* asserts that "Part III-B of the plurality opinion, also written by Justice O'Connor, was joined by Chief Justice Rehnquist and Justices White and Kennedy." 723 F.Supp. at 682. In point of (significant) fact, however, this part of the opinion forms a majority, not a plurality, and is joined by Chief Justice Rehnquist and Justices White, Stevens and Kennedy. *See* Garner, *A Dictionary of Modern Legal Usage* (Oxford Univ. Press: 1985) (A "plurality

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In the spring of 1983, the Richmond, Virginia, City Council adopted a Minority Business Utilization Plan (the Richmond Plan). The Richmond Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors.

Under the Richmond Plan, an MBE was defined as a business "at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Croson*, 488 U.S. at 478, 109 S.Ct. at 713, 102 L.Ed.2d at 871 (O'Connor J., opinion). Minority group members were defined by the City Council as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* There was no geographic limit to the Richmond Plan. A minority-owned business from anywhere in the United States could make use of the 30% set-aside. The Richmond Plan declared itself "remedial" in nature, and was "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." *Id.*

The Richmond Plan included provisions for waiver of the 30% set-aside. The Director of Richmond's Department of General Services promulgated rules allowing waiver in situations where a prime contractor proved to

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opinion" is defined as "an appellate opinion without enough judges' votes to constitute a majority, but having received the greatest number of votes of any of the opinions filed"); *see Croson*, 488 U.S. at 477, 109 S.Ct. at 712, 102 L.Ed.2d at 871.

the satisfaction of the Director that the requirements of the Richmond Plan could not be achieved. *Id.*

After a public hearing at which five citizens spoke against the Richmond Plan, and two voiced support, the Richmond City Council adopted the Richmond Plan. Proponents of the set-aside provision relied on the following: (i) a study which indicated that while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983; (ii) a variety of contractors' associations had virtually no minority businesses within their membership; (iii) one of the Richmond councilpersons advocating the Richmond Plan asserted that "race discrimination and exclusion on the basis of race is widespread" in the local and national construction industries. In addition, the district court in *Croson* found that (iv) the ordinance declares itself to be remedial, and (v) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. There was no direct evidence of race discrimination by the City of Richmond in the letting of contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. *Id.*

Croson was a mechanical plumbing and heating contractor that submitted the only bid for the installation of urinals and water closets in the city jail. After Croson failed to satisfy the 30% set-aside requirement, and the city denied its waiver request, the city decided to rebid the project. Croson then brought an action under 42 U.S.C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance

was unconstitutional on its face and as applied in this case.[21] The district court upheld the Richmond Plan and a divided panel of the Fourth Circuit Court of Appeals affirmed. *Croson v. City of Richmond Croson I*, 779 F.2d 181 (4th Cir.1985). The Supreme Court vacated the opinion of the Fourth Circuit, and remanded the case for further consideration in light of *Wygant*. On remand, a divided panel of the Court of Appeals struck down the Richmond Plan as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment,[22] *J.A. Croson Co. v. Richmond*, 822 F.2d 1355 (4th Cir.1987) (*Croson II*), and the Supreme Court affirmed. 488 U.S. at 486, 109 S.Ct. at 717, 102 L.Ed.2d at 877.

The Croson Majority (Parts I, III-B and IV)

In Parts I, III-B and IV of her opinion, Justice O'Connor was joined by the Chief Justice, and Justices White,

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[21] See *Croson* for a fuller explication of the facts of that case, and of the various pieces of evidence offered in opposition to the Richmond Plan.

[22] When private employers implement voluntary affirmative action plans, they are subject to the requirements of Title VII. Where the employer is a public body, however, it must also adhere to the requirements of the Constitution. The equal Protection Clause of the Fourteenth Amendment states, in pertinent part: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. The Supreme Court has held that the due process clause of the fifth amendment applies in an identical manner to the federal government. *See Boling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Stevens, and Kennedy. The Court found that the factual predicate of the Richmond Plan suffered from the same defects as those found fatal to the plan in *Wygant*:

> Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. . . . While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify the use of an unyielding racial quota. . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Croson, 488 U.S. at 498, 109 S.Ct. at 723-24, 102 L.Ed.2d at 885. The Court went on to discuss the five predicate "facts" relied upon by the district court, (see five facts listed *supra*), and determined that:

> None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. 267, 277 [106 S.Ct. 1842, 1849] (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.* at 274-75 [106 S.Ct. at 1847]; see also *id.* at 293 [106 S.Ct. at 1857] (O'Connor, J., concurring.)

Id. The Court discussed separately the defects in each of the five "facts," and concluded that the 30% quota could not "in any realistic sense be tied to any injury suffered by anyone." *Id.* at 499, 109 S.Ct. at 724, 102 L.Ed.2d at 885.

For our purposes, the Court's discussion of the statistical disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond (fact (i), *supra*), is particularly relevant:

> Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 [97 S.Ct. 2736, 2741, 53 L.Ed.2d 768] (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* at 308, n. 13 [97 S.Ct. at 2742, n. 13]. *See also Mayor v. Educational Equality League*, 415 U.S. 605, 620 [94 S.Ct. 1323, 1333, 39 L.Ed.2d 630] (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").
>
> In the employment context, we have recognized that for certain entry level positions requiring minimal training, statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. *See Teamsters v. United States*, 431 U.S. 324, 337-38 [97 S.Ct. 1843, 1855-56, 52 L.Ed.2d 396]

> (1977) (statistical comparison between minority truck drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. *See Hazelwood, supra,* [433 U.S.] at 308 [97 S.Ct. at 2742]; *Johnson v. Transportation Agency,* 480 U.S. 616, 651, 652 [107 S.Ct. 1442, 1462, 94 L.Ed.2d 615] (1987) (O'Connor, J., concurring.)

After discussing the weaknesses in the five predicate "facts," the Court went on to impugn the "gross overinclusiveness" of the Richmond Plan, which included Spanish-speaking, Oriental, Indian, Eskimo, and Aleut persons as minorities qualified for the 30% MBE preference. The total absence of evidence presented of past discrimination against any of these groups fanned the flames of doubt burning in the Court that "the city's purpose was not in fact to remedy past discrimination." The Court questioned whether the Richmond Plan was "narrowly tailored" to compensate black contractors for past discrimination, since they are forced to share this "remedial relief" with "an Aleut citizen who moves to Richmond tomorrow." *Id.* at 506, 109, S.Ct. at 728, 102 L.Ed.2d at 890.

In addition, the Court found that the Richmond Plan was not narrowly tailored to remedy prior discrimination because the Richmond City Council did not consider the use of "race-neutral means to increase minority business participation in city contracting." *Id. (citing Paradise,* 480 U.S. at 171, 107 S.Ct. at 1066, 94 L.Ed.2d at 223 ("In

determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies")). Since the City of Richmond relied upon alleged race-neutral *barriers* to minority participation in the construction industry, e.g., they claimed that MBEs disproportionately lacked capital and could not meet bonding requirements, then "a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation."[23]

IV.

Application

This part is the separate opinion of Judge Brown in support of his conviction that remand is not required to

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[23] Pre-*Croson* cases of the Eleventh Circuit afford little help. *See Mann v. City of Albany, Georgia*, 883 F.2d 999 (11th Cir.1989); *Howard v. McLucas*, 871 F.2d 1000 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 560, 107 L.Ed.2d 555 (1989); *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *vacated*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989).

Post-*Croson* cases are few. *S.J. Groves & Sons Co. v. Fulton County U.S. Department of Transportation*, 920 F.2d 752 (11th Cir.1991) concludes that the *Croson* strict scrutiny standard is lessened by *Metro Broadcasting, Inc. v FCC*, ___ U.S. ___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). *See also Cone Corp. v. Florida Department of Highways*, 921 F.2d 1190 (11th Cir. 1991) (*Croson* not determinative, dismissed for lack of standing).

Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.1990), Johnson J., is highly significant, reversing the district court's declaration that *Croson* required a finding of unconstitutionality, *see, e.g.*, 908 F.2d at 914, 916.

determine application of *Croson*, (i) on equal protection or (ii) whether, if applicable, in assaying Title VII, *Croson* is met. Chief Judge Tjoflat and Judge Johnson do not join in this section because they believe that the claim that Metro Dade affirmative action violates the Equal Protection Clause of the Fourteenth Amendment should be remanded to the District Court for consideration in light of *Croson*. Chief Judge Tjoflat concurs additionally, in his concurring/dissenting opinion.

Croson made clear that a strict scrutiny standard will now be applied by a majority of the Supreme Court to race-based affirmative action plans in the public employment context.[24] However, the determination that strict judicial scrutiny is the appropriate standard of review only serves as the first step. The more difficult determination is the proper application of that standard. In *Wygant*, the plurality established two prongs to the strict scrutiny analysis: "First, any racial classification 'must be justified by a compelling governmental interest'. . . . Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, 476 U.S. at 285, 106 S.Ct. at 1852, 90 L.Ed.2d at 275 (Powell. J., joined by Burger, C.J., and Rehnquist and

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[24] In his *Croson* dissent, Justice Marshall conceded that in *Croson* "for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures." *Croson*, 488 U.S. at 551, 109 S.Ct. at 752, 102 L.Ed.2d at 919 (Marshall, J., dissenting.) This majority includes Chief Justice Rehnquist, and Justices White, O'Connor, Scalia and Kennedy. *See also Krupa v. New Castle County*, 732 F.Supp. 497 (D.C.Del.1990).

O'Connor, JJ.). My analysis demonstrates that the Plan satisfies both of these prongs.

1. Compelling Purpose

The Constitution requires some showing of prior discrimination by the public employer to justify the remedial use of race-preferential measures. *See Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847, 90 L.Ed.2d at 269 (Equal Protection Clause requires "some showing of prior discrimination by the government unit involved before allowing the use of racial classifications in order to remedy such discrimination") (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ.). The plurality opinion adds that "*Hazelwood* demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." *Id.* at 275, 106 S.Ct. at 1847, 90 L.Ed.2d at 269. The majority of the Court in *Croson* held that public employers, like Dade County, "must identify . . . discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 505, 109 S.Ct. at 727, 102 L.Ed.2d at 889 (opinion of the Court).

Generalized allegations of discrimination in the subject industry or in education and training, hold little probative value in identifying discrimination in the relevant industry. *See id.* at 503, 109 S.Ct. at 726, 102 L.Ed.2d at 888.[25] Evidence of discrimination in other jurisdictions

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[25] *See generally*, Taylor, *The Equal Protection Dilemma of Voluntary State and Local Set-Aside Programs for Minorities and Women*, 27 Hous.Law Rev. 45, 60-61 (1990).

or on a nationwide basis also have little or no probative value. *Id.* Statements by public officials assigning benign or remedial objectives to an affirmative action program also remains inadequate without additional proof. *Id.* As Justice O'Connor sees it, the foregoing types of generalized evidence are too "amorphous" to justify race-based relief. They do not adequately identify actionable discrimination nor do they permit tailoring of an appropriately narrow remedy. *Id.*

As the Court points out above, *Croson* reaffirmed the use of statistical comparisons between the employer's work force and the composition of the relevant population as probative of a pattern of discrimination. To successfully meet the factual predicate under the first prong of the strict scrutiny standard by employing indirect evidence in the form of statistics, Dade County has the burden of producing evidence that the statistical disparity between the relevant employee and work force populations is at least "approaching a prima facie case of a constitutional or statutory violation." *Id.* at 500, 109 S.Ct. at 724, 102 L.Ed.2d at 886; *see also Wygant*, 476 U.S. at 274-75, 106 S.Ct. at 1847, 90 L.Ed.2d at 269 (plurality opinion), and *id.* at 293, 106 S.Ct. at 1857, 90 L.Ed.2d at 281 (O'Connor, J., concurring). The following issues need be addressed: (i) Does the Dade County firefighter position at issue "require special qualifications"? *see Croson*, 488 U.S. at 501, 109 S.Ct. at 725, 102 L.Ed.2d at 887; (ii) May general population figures be used? (iii) Has the proper geographic scope been employed? and (iv) What degree of imbalance constitutes "approaching a prima facie case" of a violation?

(i) Does the Dade County Firefighter Position Require "Special Qualifications"?

In *Croson*, Justice O'Connor reaffirmed the significance that the Court places on the nature of the job receiving race-based preferences. *Id.*, and *see* discussion of *Croson, supra*. To determine discriminatory exclusion, unskilled positions are compared to a different statistical pool than for jobs requiring special training. *Id., and see Teamsters*, 431 U.S. at 337-38, 97 S.Ct. at 1855-56, 52 L.Ed.2d at 416-17.

The Supreme Court has given only limited guidance in distinguishing skilled positions from unskilled. In *Hazelwood*, 433 U.S. at 308 n. 13, 97 S.Ct. at 2742, 53 L.Ed.2d at 777, for example, the Court stated that the truck driver position at issue in *Teamsters* required no special qualifications because "the job skill there involved . . . is one that many persons possess or can readily acquire."[26] Likewise, the Court has ruled that entry-level spots in a job training program require no special prior abilities because they are, in fact, "designed to provide expertise." *Johnson*, 480 U.S. at 632, 107 S.Ct. at 1452, 94 L.Ed.2d at 631. On the other hand, the public school teachers at issue in *Hazelwood*, according to the

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[26] The truck drivers at issue in *Teamsters* were "line drivers." 431 U.S. at 329 n. 3, 97 S.Ct. at 1852 n. 3, 52 L.Ed.2d at 412 n. 3. Line drivers, "also known as over-the-road drivers, engage in long-distance hauling between company terminals." *Id.*

Court, did work in a profession requiring special expertise.[27]

Candidates for selection as a firefighter for Dade County have to meet certain basic requirements (*see n. 6, supra*). However, as the district court found, none of these requirements reach the level of "special expertise." There is no basis for rejecting as clearly erroneous, F.R.Civ.P. 52(a), the trial court's finding that firefighter applicants are "unskilled" for purposes of comparative statistical analysis.

(ii) When May General Population Figures Be Used?

When the Supreme Court has faced an unskilled position of employment, it has compared the employer's work force both to the area's general population, *Teamsters, supra,* and to the area's generalized labor market, *Weber, supra.* In *Johnson,* the Court reaffirmed both comparisons and suggested that either would be appropriate, expressing no preference between the alternative pools. *Johnson,* 480 U.S. at 631-32, 107 S.Ct. at 1451-52, 94 L.Ed.2d at 630-31 ("In determining whether an imbalance exists that would justify taking sex or race into account, a

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[27] Lower courts have differed over the status of firefighter recruits. *See Hammon v. Barry,* 826 F.2d 73 (D.C.Cir.1987), *cert. denied,* 486 U.S. 1036, 108 S.Ct. 2023, 100 L.Ed.2d 610 (1988); *Janowiak v. Corporate City of South Bend,* 836 F.2d 1034 (7th Cir.1987), *cert. denied, South Bend v. Janowiak,* 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989). However, because the issue as to whether a position of employment is skilled or unskilled is highly fact specific, the determinations in these cases about the status of firefighters has little binding or persuasive effect.

comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . or training programs designed to provide expertise.") (*citing Teamsters, supra,* and *Weber, supra*). In *Croson,* the Court seemed to lump both choices together by referring to the "composition of the *relevant population.*" *Croson,* 488 U.S. at 501, 109 S.Ct. at 725, 102 L.Ed.2d at 887.

The district court in this case simply looked at the percentages of minorities in Dade County, and compared that with the percentages of minorities employed as firefighters in the Department, to decide whether the disparities justified an affirmative action program.[28] Because there is nothing in this record showing that the use of general population figures is improper, and no attack has in any way been leveled at its use, or assertion been made that a different labor pool should be employed than the general population to determine whether or not there was prior discrimination in the Fire Department, I would approve the district court's usage of the general population for statistical comparative purposes.

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[28] The district court applied pre-*Croson* Title VII criteria to the Plan, i.e., is it designed to alleviate a "manifest imbalance" in minority representation, and does it "unnecessarily trammel" the rights of non-minorities. As I stated, *supra,* that standard has probably been elevated to the constitutional "strict scrutiny" standard.

(iii) Has the Proper Geographic Scope Been Employed?

The Supreme Court has yet to give definitive guidance about precisely how to identify the appropriate geographic limits to a labor pool.[29] Accordingly, lower courts have differed sharply over how to define the geographic boundaries for the relevant labor market. *See Hammon*, 826 F.2d at 78 (looking only to the labor force of the District of Columbia itself provided "an entirely artificial comparison," because the fire department recruited in Maryland and Virginia) (Starr, J., concurring); *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987) (relying primarily upon a labor pool confined to the geographic borders of the District of Columbia to find manifest racial and gender imbalances in the D.C. police force), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

In our case, the use of the Dade County geographical boundaries has gone unchallenged, and for good (geographical) reasons. However, Peightal claims that the issue to be considered is the effect of several departmental mergers. The testimony at trial reveals that during the 1970's, there were "several mergers which brought in a number of all white small departments into [the Dade County Fire Department]." However, there is very limited evidence in the record regarding these mergers. Fire Chief Edward Donaldson recalled "three small mergers . . . Homestead, Opa-Locka and Miami Springs, none of them having minority employees, and so – which

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[29] *See* Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical test for Voluntary Affirmative Action Under Title VII*, 87 Michigan Las Rev. 1986, 2015 (1989).

probably, just from that alone increasing, the size of the the department also increased by some forty to sixty majority employees."[30]

Although the overall disparity between the percentages of minorities and nonminorities throughout the Dade County Fire Department may have been slightly altered by these mergers (which apparently occurred many years before the Plan was adopted), there is no record evidence that, absent the mergers, a disparity great enough to justify the Plan would not have existed.[31] I conclude that the proper geographic boundaries for comparitive purposes were those of Dade County.

(iv) What Degree of Imbalance is "Approaching a Prima Facie Case" of a Violation?

The statistical imbalance between minorities and nonminorities in the relevant work force and available labor pool must be "approaching a prima facie case of a constitutional or statutory violation" before a public

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[30] Since these three small fire departments were physically within Dade County, this has nothing to do with any thought of extra-territorial application of the Plan.

[31] Other than the testimony quoted above, there is absolutely no evidence about the total number of mergers, (although the fire chief testified that "we have had a *number* of such mergers"), or the numbers of firefighters in these all-white departments, or the effect of the merger on overall minority percentages within the Dade County Fire Department. Mergers of existing special districts, including fire departments, is one of the charter functions of metropolitan Dade County. *See* n. 4, *supra*.

employer may voluntarily adopt a racial or gender preferences. *Croson*, 488 U.S. at 500, 109 S.Ct. at 724, 102 L.Ed.2d at 886; *see also Wygant*, 476 U.S. at 274-5, 106 S.Ct. at 1847, 90 L.Ed.2d at 269 (plurality opinion), and *id.* at 293, 106 S.Ct. at 1857, 90 L.Ed.2d at 280 (O'Connor, J., concurring). Prior Court rulings indicate what sort of statistical disparity is required to make out a prima facie case of direct discrimination against an employer. The "general rule" is that the disparity must be "greater than two or three standard deviations" before it can be inferred that the employer has engaged in illegal discrimination under Title VII. *Casteneda v. Partiada*, 430 U.S. 482, 497 n. 17, 97 S.Ct. 1272, 1281, 51 L.Ed.2d 498, 512 (1977); *see also Hazelwood*, 433 U.S. at 308, 97 S.Ct. at 2741, 53 L.Ed.2d at 777. The Court has also called that sort of imbalance a "gross statistical disparit[y]." *Hazelwood*, 433 U.S. at 307, 97 S.Ct. at 2741, 53 L.Ed.2d at 777, *cited with approval in Croson*, 488 U.S. at 501, 109 S.Ct. at 725, 102 L.Ed.2d at 887.[32]

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[32] For examples of numerical disparities that the Court has held are sufficient to make out prima facie cases, *see Dothard v. Rawlinson*, 433 U.S. 321, 329-30, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786, 797-98 (1977) (state policy of only hiring prison guards between 5'2', 120 lbs. and 6'10', 300 lbs., thus excluding 41.3% of the female population but less than 1% of the male population); *Hazelwood*, 433 U.S. at 303-05, 97 S.Ct. at 2739-40, 53 L.Ed.2d 774-76 (blacks comprising 1.8% of teachers in rural district in St. Louis County contrasted to 15.4% in all districts combined). *See also Bazemore v. Friday*, 478 U.S. 385, 399-401, 106 S.Ct. 3000, 3008-09, 92 L.Ed.2d 315, 330-32 (1986) (salary disparity between blacks and whites of $331 in 1974 and $395 in 1975).

I find that the percentages of minorities in the Metropolitan Dade County Fire Department, as compared with the percentages of minorities in Dade County, reveals a statistical disparity far in excess of two or three standard deviations.[33]

I would heed Justice Holmes' warning that "[t]he passion for equality sometimes leads to hollow formula" *Postal Telegraph-Cable Co. v. Tonopah & T.R. Co.*, 248 U.S. 471, 475, 39 S.Ct. 162, 164, 63 L.Ed. 365, 371 (1919); *see also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 at 995, 108 S.Ct. 2777 at 2789, 101 L.Ed.2d 827 at 846 n. 3 (1988) ("we have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of "standard deviations" can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. . . . Nor has a consensus developed around any alternative mathematical standard"). However, the number of standard deviations in the case before the Court exceeds the approximate minimum to a degree

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[33] To determine whether there was evidence of discrimination against Hispanics in the Department, for example, I compare the expected number of Hispanics in the Department (which is 35.8% x 921 =330), to the actual number of Hispanics on the firefighter force, which is 127. The difference between the actual number and the observed number is 203.

The standard deviation in this case is equal to the square root of 921 x .358 x .642, or approximately 14.5. *See Casteneda, supra.* To derive the number of standard deviations present in our case, then, we divide 203 by 14.5, to obtain 14 standard deviations. Since 14 standard deviations markedly surpasses the rough limit of 2 or 3 standard deviations, I would hold that evidence of prior discrimination exists.

sufficient to avoid the risks associated with the rigid application of an inflexible mathematical formula.

2. Narrowly Tailored

The second prong of the strict scrutiny standard requires action whether the Plan is narrowly tailored to achieve the compelling state interest. In essence, this requirement demands that an affirmative action plan " 'fit' with greater precision than any alternative means," *Associated General Contractors Inc. v. San Francisco*, 813 F.2d 922, 935 (9th Cir. 1987) (*quoting Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. at 1866 n. 6, 90 L.Ed.2d at 279), thereby assuring "that there is little or not possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493, 109 S.Ct. at 721, 102 L.Ed.2d at 882. To determine whether the Plan achieves this requisite fit, focus must be on the following four general considerations: (i) the efficacy of alternative remedies; (ii) the flexibility and duration of the Plan; (iii) the over-or-under-inclusiveness of the Plan; and (iv) the effect of the remedy upon innocent third parties.[34]

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[34] The elements chosen for consideration under the second prong of the strict scrutiny analysis will vary with the particular circumstances of the case. *See Paradise*, 480 U.S. at 187, 107 S.Ct. at 1074, 94 L.Ed.2d at 233 (Powell, J., concurring) (listing the following five factors: (i) the efficacy of alternative remedies; (ii) the planned duration of the case; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties); *see also*

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(i) The Efficacy of Alternative Remedies

To determine whether a minority preference program, like the one struck down in *Croson*, is narrowly tailored to serve a compelling state interest, one must inquire whether the local legislature considered "the use of race-neutral means to increase minority" participation. *Id.* at 507, 109 S.Ct. at 728, 102 L.Ed.2d at 890 (majority opinion). In *Croson*, the Supreme Court observed that there was absolutely no evidence in the record that the Richmond City Council considered any alternatives to the racial quota adopted. *Id.* The Court compared this absence of evidence to the situation in *Fullilove*, in which Congress "carefully examined and rejected race-neutral alternatives before enacting the MBE setaside," *id.* at 507, 109 S.Ct. at 728, 102 L.Ed.2d at 891, and the program therein was found constitutional.

There is evidence in the record that Metro Dade pursued without success other means to increase the representation of minorities in the Department. Chief Edward Donaldson testified at trial that the Fire Department had a recruitment program aimed at minorities. He

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id., 4880 U.S. at 171, 107 S.Ct. at 1066, 94 L.Ed.2d at 223 (plurality), and Taylor, *Set Aside Programs, supra*, at 63 (listing the following four factors: (i) the efficacy of alternative remedies; (ii) the flexibility and duration of the program and its waiver provisions; (iii) the relationship between the preference and the relevant labor market; and (iv) the program's impact upon the rights of third parties).

In determining the legitimacy of an affirmative action plan under the narrowly tailored prong, any of the above elements that is outcome-determinative should be included in the analysis.

stated that recruiters were sent to high schools and college campuses to inform and encourage minority students to sign up for the Fire Department's test. Because it was difficult for the Department to find women capable of passing the physical capability test, they apparently had "a very targeted program to identify females and get them interested in the position of firefighter." (Testimony of Jacqulyn Rowe-Dottin, Human Resources Coordinator.)

Moreover, the Department's "Affirmative Action Program" for 1983-83 included a "Summary Agreement" (Agreement) that detailed the planned recruitment efforts of the Fire Department. The Agreement provided for a "recruitment specialist" to organize and implement a "special recruitment program." The duties of the recruitment specialist included presentations at local colleges, high schools, job fairs and career day presentation. In addition, the recruitment specialist was to coordinate with minority and female organizations in order to "inform the entire Dade County community of fire service career opportunities." The Agreement also provided for special programs directed towards minority youth, such as a "Summer Youth Employment Program," which employed minority youths while educating them about fire prevention. Additionally, a group of black firefighters from the Department, the "Progressive Firefighters," was to continue an outreach program to the black community, according to the terms of the Agreement.

The Fire Department's programs to increase the number of minorities in the Department through special outreach and recruitment programs are impressive.

Accordingly, I am satisfied that the Department has sufficiently considered and implemented additional remedial alternatives.

(ii) The Flexibility and Duration of the Plan

In determining whether the Metro Dade Plan meets the narrow tailoring requirement, consideration of the flexibility and duration of the program must be given. Courts considering whether a minority preference plan meets the precision requirement emphasize that the government entity should adopt the program for a limited duration to facilitate a periodic re-evaluation of the program. *See, e.g., Fullilove,* 448 U.S. at 513, 100 S.Ct. at 2792, 65 L.Ed.2d at 947 (Powell, J., concurring) ("The temporary nature of this remedy ensures that a race-conscious program will not last longer that the discriminatory effects it is designed to eliminate"); *accord L.D. Mattson, Inc. v. Multomah County,* 703 F.Supp. 66, 68 (D.Or.1988). In addition, because rigid quotas are by their very nature antithetical to the flexibility mandated by the narrow tailoring requirement, unyielding preferential quotas will normally doom an affirmative action plan. *See Croson,* 488 U.S. at 508, 109 S.Ct. at 729, 102 L.Ed.2d at 891 (highly critical of rigid quotas); *Paradise,* 480 U.S. at 197, 107 S.Ct. at 1080, 94 L.Ed.2d at 240 (O'Connor, J., dissenting) (rigid quota for affirmative action plan is impermissible).[35] The Supreme Court has specifically approved the use of "hiring goals," on the other hand, which do not rigidly dictate a required number of minorities to be hired. *See, e.g., Johnson, Wygant, Weber.*

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[35] *See* Taylor, *Set Aside Programs, supra,* at 65.

The Metro Dade Plan does not continue indefinitely, but terminates upon the satisfaction of its affirmative action goals. Ms. Rowe-Dottin testified that "[t]he plan is reviewed annually . . . [T]he plan is remedial in nature, and it addresses problems of under-utilization. If they don't exist, then there is no need to set a goal."[36] Moreover, the Plan's hiring provisions are appropriately sensitive to the Supreme Court's distinction between "goals" and "quotas". The Dade County "Affirmative Action Policy and Statement: Goals and Timetables," (AAPS), states:

> Under a system of goals, therefore, the County is never required to hire a person who does not have qualifications needed to perform the job successfully; and the department is never required to hire an unqualified person in preference of another applicant who is qualified.

The Fire Department followed the guidelines outlined in the AAPS, because although it sought to hire 37 Hispanics, it was only able to hire 28. THe Department was unwilling to hire unqualified minorities just to meet its goals. Had a strict quota been in place, on the other

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[36] After the Plan's goals have been achieved, and the Plan terminates, the Fire Department will probably face another problem. Without the Plan, almost no minorities would have been hired in 1983 because of their relatively low test scores. (Of the top 100 persons on the hiring list, only six were Hispanic, none was Black, and one, number 100, was female.) Unless these scores improve, the percentages of minorities in the Department will obviously decrease after the Plan is withdrawn, creating a need for the plan once again. I do not address whether the re-implementation of the Plan in such circumstances would be legitimate, since the issue is not before us.

hand, the Department would have been required to fill these 37 positions with Hispanics. Because the Plan does not endure *in perpetuity*, and because it does not impose rigid quotas, I find that Metro Dade has satisfied this second criterion of the narrowly tailored prong.

(iii) Over-and Under-Inclusiveness of the Plan

The crux of Peightal's argument on appeal is that the Plan is both over-and-under-inclusive in its preferential treatment of Hispanics. Peightal maintains that the Dade County minority preferences program is over-inclusive because it favors white European Spaniards with no significant cultural or linguistic discernibility from non-Hispanic white persons.[37] In addition, Peightal argues that the Plan is under-inclusive because the class of persons qualifying for preferential treatment as "Hispanics" fails

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[37] The Court in *Croson* found the Richmond Plan over-inclusive. *See* 488 U.S. at 506, 109 S.Ct. at 728, 102 L.Ed.2d at 890 ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation"). The Court here cited *Wygant*, 476 U.S. at 284 n. 13, 106 S.Ct. at 1852, 90 L.Ed.2d at 275 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"), and cited *days*, 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination"). *Croson*, 488 U.S. at 506, 109 S.Ct. at 728, 102 L.Ed.2d at 890 (majority opinion).

However, the over-inclusiveness at issue in *Croson* is not present in our case, since Metro Dade is not offering hiring preference to any groups, e.g., Aleuts or Eskimos, against which no discrimination has been found.

to include other national and ethnic groups that are susceptible to similar discrimination.

The EEOC definition of "Hispanic," as applied by Metro Dade, includes: "All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race." Peightal asserts that this definition is over-inclusive because it includes persons who can trace their ancestry to Spain, irrespective of language or culture, but would preclude favorable treatment to persons with Portuguese heritage, for example. According to Peightal, since white European Spaniards with no visibly discernable "Hispanic" characteristics have not been subjected to past or present discrimination, it violates the narrowly tailored prong of the strict scrutiny prong to include them in the favored group called "Hispanics."

While it may seem anomalous to grant employment preferences to a light-skinned descendant of Spanish grandparents who speak no Spanish and has no individual cultural ties to an American Spanish community or to Spain, (while denying such preferences to the Portuguese-speaking offspring of Portuguese parents), such a situation would not arise under the Metro Dade Plan, because the Plan adopts the EEOC requirement that a person's claim of identification with a certain racial or ethnic group "should accompany strong visible indication that the person *culturally* and *linguistically* identifieswith the group he or she claims." (emphasis in original).[38]

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[38] If Peightal had successfully revealed that a light-skinned Castillian, for example, with no discernable cultural or linguistic Hispanic characteristics, had been hired as a firefighter in his stead, then his claim of over-inclusiveness would have more force.

As for the Plan's alleged under-inclusiveness, Peightal argues that it excludes, and therefore discriminates against, members of European national origin, Middle Eastern national origin, and Slavic/Russian national origin, while benefitting those of Spanish origin. Peightal claims that Greeks, Italians, Portuguese, Jews, Israelis, Iranians, and others, are all culturally and linguistically discernable and subject to discrimination in the work place as a result of their ethnic characteristics. However, since these groups are not benefited by the Department's minority preference program, Peightal argues that the Plan is therefore unconstitutionally under-inclusive.

However, it is well established that the Equal Protection Clause does not require public employers to institute affirmative action goals for each and every ethnic group that may exist in a community.[39] In adopting an affirmative action plan an employer may rationally limit its application to those minority groups in the local work force that are most in need of remedial efforts. *Cf. Bakke*, 438 U.S. at 359 n. 35, 98 S.Ct. at 2751, 57 L.Ed.2d at 774. The Equal Protection Clause does not require a state to grant preference to one or more groups. A state actor does not violate the Fourteenth Amendment so long as "it [is] rational . . . to conclude that the groups [the state actor] preferred had a greater claim to compensation than the groups it excluded." *Id.* In Dade County, the two most

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[39] Peightal's standing to bring this issue is dubious, since there is nothing in the record showing that Peightal is a member of any of these unprotected groups.

prevalent minority groups are blacks and Hispanics. We hold that an affirmative action plan addressing past discrimination against these two groups is rational, and therefore not under-inclusive.

(iv) The Effect of the Remedy Upon Innocent Third Parties

Unquestionably, Peightal was harmed by the hiring preferences dictated in the Metro Dade Plan. However, a state or local government may constitutionally require innocent nonminorities to share the burden of remedying the effects of past identified discrimination. *See Fullilove* 448 U.S. at 484 100 S.Ct. at 2777, 65 L.Ed.2d at 928. As the plurality explained in *Wygant:*

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Wygant, 476 U.S. at 282, 106 S.Ct. at 1851, 90 L.Ed.2d at 274 (Burger, C.J., and Powell, Rehnquist and O'Connor, J.J.) (emphasis in original).

The plan calls for no layoffs, as in *Wygant*, and it does not impose an absolute bar to the hiring of non-minorities. *See Paradise*, 480 U.S. at 184, 107 S.Ct. at 1073, 94 L.Ed.2d at 231. Accordingly, I would hold that the Plan did not have an unconstitutional effect on non-minorities.

To Sum It Up

The county has complied with the requirements of the first prong of the strict scrutiny standard by showing a compelling government purpose for the Plan. In particular, I conclude that(*i*) the firefighter position at issue was unskilled; (*ii*) the general population was the proper labor pool to use for comparative purposes; (*iii*) Dade County was the appropriate geographic area; and (*iv*) the disparity between the percentages of minorities in the Fire Department and the general population was great enough to justify the trial court's finding of previous discrimination by Metro Dade, and the need for the kind of remedial efforts sought by the Plan.

The second prong of the strict scrutiny standard was also satisfied by Metro Dade; because the Plan was narrowly tailored to meet its remedial objectives. More specifically, the Plan (*i*) adequately considered and implemented alternative remedies to a minority-preference program; (*ii*) was flexible and of limited duration; (*iii*) was not unconstitutionally over-or-under-inclusive; and (*iv*) did not unnecessarily trammel on the rights of nonminorities.

V.

Title VII Not Violated

Judge Brown and Judge Johnson join in this part. Chief Judge Tjoflat dissents. Peightal challenges the Metro Dade Plan under Title VII. The Court can, with confidence, determine that the Plan is valid under Title VII.

[1] There is, first, gross disparity in employment of minorities going back to 1965. By 1975, with increase in the size of the department the percentage of white employees was 89%. By 1983, when the Plan was adopted, the department then numbering 921, the whites comprised 74% with only 11.8% black, 13.8% Hispanic and women 1.3%. This was in contrast to the make-up of the general population (the available labor pool) which was 47% white, 17.3% black, 35.8% Hispanic and 50% female. (See Part I.) Moreover, the disparity was great enough to do more than satisfy the standard deviation test[40] of *Castaneda* and *Hazelwood*, to constitute a "gross statistical disparity", *see* nn. 32 and 33.

In view of the virtually uncontradicted evidence of gross discrimination, the principles of *Wygant, Fullilove and Bakke*,[41] and the six Supreme Court decisions[42] upholding the constitutionality of affirmative action programs, and the strict scrutiny imperative of *Croson*, the Metro Dade Plan is valid and in Full keeping with Title VII.

The District Court judgment on Title VII is correct and affirmed.

Conclusion

In sum, the Court affirms the lower court's decision upholding the legality of the Metro Dade Plan against Title VII challenges. As to whether the Plan is a denial of

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[40] *see supra*, n.32 and related text.

[41] *See* n. 16, supra

[42] Set forth in n. 17, *supra*.

Equal Protection in light of *Croson*, the case is remanded to the District Court for consideration in the light of *Croson*.

AFFIRMED in part; **REMANDED** in part.

TJOFLAT, Chief Judge, concurring in part and dissenting in part;

I agree with Judge Johnson's conclusion that we should remand appellant's equal protection claim to the district court for reconsideration in light of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). As *Croson* makes clear, equal protection challenges to affirmative action plans turn on detailed factual evaluations. We, as an appellate court, are ill equipped to make initial factual determinations. Therefore, I think it best that we remand appellant's equal protection claim to the district court so that it may decide the merits of this claim. On remand, the district court, which previously resolved this case without the benefit of *Croson*, will be able to analyze the relevant facts extensively. In this way, we ensure that appellant's claim receives full and fair adjudication.

I disagree, however, with the court's decision to affirm the district court's judgment for the appellee on the Title VII claim. The appellant established a prima facie case showing that the appellee took race into account in deciding not to hire him. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (discussing prima facie showing). The appellee responded by demonstrating that it made this decision in compliance with its affirmative action plan. When "such a plan is articulated as the basis for the

employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid." *Johnson v. Transportation Agency*,480 U.S. 616, 626, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987). This case boils down to whether the appellee's affirmative action plan is valid.

Under Title VII, an employer voluntarily may adopt an affirmative action plan to overcome the existence of a "manifest imbalance" in a traditionally segregated job category. *Id.* at 631, 107 S.Ct. at 1451-52. "In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise." *Id.* at 631-32, 107 S.Ct. at 1452. If the job at issue requires special qualifications, however, "the comparison should be with those in the labor force who possess the relevant qualifications." *Id.* at 632, 107 S.Ct. at 1452. Additionally, a court must consider whether the plan, in its effort to overcome a manifest imbalance, "unnecessarily trammel[s]" the rights of those not benefited by it (i.e., nonminorities and men). *Id.* at 637-38, 107 S.Ct. at 1455; *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979). Applying this test, the district court concluded that the appellee's affirmative action plan was valid. Accordingly, it rejected appellant's Title VII claim.

In my opinion, the district court used a flawed methodology to conclude that there is a manifest imbalance between the percentage of minorities employed by appellee and the percentage of minorities in the relevant labor

pool. In reaching this conclusion, "[t]he district court- . . . simply looked at the percentages of minorities of Dade County, and compared that with the percentages of minorities employed as firefighters in the Department, to decide whether the disparities justified an affirmative action program." *Ante* Maj. op. at 1405 (opinion of Brown, J.). The court relied on general population figures because it found that firefighters do not possess special expertise. General population figures, however, only serve as a proxy for the qualified applicant pool from which the employer is hiring. Where evidence exists "showing that the figures for the general population might not accurately reflect the pool of qualified job applicants," the value of such figures for evaluating the legality of an affirmative action plan is greatly diminished. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n. 20, 97 S.Ct. 1843, 1857 n. 20, 52 L.Ed.2d 396 (1977); *see also Croson*, 488 U.S. at 501, 109 S.Ct. at 725 (equal protection case). In such a case, the court should search for figures that more closely approximate the qualified applicant pool, instead of assuming that the racial composition of the population as a whole reflects the racial composition the qualified labor pool. *Cf. Wards Cove Packing Co. v. Antonio*, 490 U.S. 642. 650, 109 S.Ct. 2115, 2121, 104 L.Ed.2d 733 (1989) (disparate impact case).

In the present case, the district court ignored evidence of the Dade County Fire Department's minimum requirements for entry-level firefighters, particularly age restrictions. By failing to take these restrictions into account, the district court probably misstated–over or under– the imbalance, if any, between the percentage of minorities employed by the appellee and the percentage

of minorities in the relevant (i.e., qualified) labor pool. A large segment of the Dade County population, to which the district court compared appellee's work force, is no doubt ineligible for an entry-level position as a firefighter.

The district court should have compared the appellee's work enforce to that segment of the general population of Dade County who qualify for work as entry-level firefighters. While I appreciate the difficulty, if not impossibility, in obtaining labor market figures that precisely identify the racial composition of the qualified applicant pool, the district court, at the very least, could have compared the appellee's work force to those members of the general population of Dade County who fall within the qualified age group (for which figures are readily available). *See Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1039-40 (7th Cir.1987); *Hammon v. Berry*, 826 F.2d 73, 77 (D.C.Cir.1987) (denial of rehearing by panel) ("There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area.*"[1]

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[1] Indeed, the *Teamsters* Court recognized the point I make here. In *Teamsters*, the employer argued that the general population figures "failed to show what portion of the minority population was suited by age, health, or other qualifications" to hold the job in question-line-driver trucking jobs. *Teamsters, 431 U.S. at 342 n. 23, 97 S.Ct. at 1858 n. 23. The Court noted that this attack may undermine "the accuracy of the comparison between the composition of the company's work force . . . and the general population of the surrounding communities." Id.* In that case, however, the diminished value of the statistics was of no

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The proper course, then, is for us to remand the Title VII claim so that the district court may correctly decide whether there is a manifest imbalance between the racial composition of appellee's work force and the racial composition of the qualified labor pool. By failing to take this course, the court today validates the district court's clearly erroneous methodology, at the risk of affirming an unlawful affirmative action plan and at the expense of appellant's claim of racial discrimination.[2] Therefore, I respectfully dissent from the court's decision to affirm the district court's judgment concerning the appellee's Title VII claim.

(Continued from previous page)

moment: the employer still could not explain why qualified minorities whom it did hire were overwhelmingly excluded from the higher paying line-driver jobs; "fine tuning of the statistics could not have obscured the . . . 'inexorable zero'" of minority line drivers. *Id.* In our case, there is no "inexorable zero"; rather, at the time the appellee adopted its affirmative action plan, its work force was comprised of 11.8% African-Americans, 13.8% Hispanics, and 1.3% women. Thus, to judge the legality of this affirmative action plan correctly, it is imperative that we compare the employer's work force to the qualified labor pool rather than the general population.

[2] The court also appears to have subjected appellant's Title VII claim to the standard reserved for claims brought under the equal protection clause. *See ante* Maj. op. at 1410 (relying on "the principles of *Wygant*, *Fullilove*, and *Bakke*, . . . and the strict scrutiny imperative of *Croson*"); *see also ante* Maj. op. at 1405 n. 28 (opinion of Brown, J.). Were we writing on a clean slate, I might agree with this approach for analyzing Title VII claims involving the affirmative action plans of public employers. The Supreme Court, however, explicitly has rejected the argument that "the obligation of a public employer under Title VII must be identical to its obligations under the Constitution."

(Continued on following page)

JOHNSON, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Brown's conclusion that the district court's judgment for the defendant, Metropolitan Dade County, on the plaintiff's Title VII claim should be affirmed. However, in my opinion, the plaintiff's claim that the affirmative action program violates the Equal Protection Clause of the Fourteenth Amendment should be remanded to the district court for consideration in light of the Supreme Court's decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

(Continued from previous page)

Johnson v. Transportation Agency, 480 U.S. 616, 627 n. 6, 632, 107 S.Ct. 1442,1449 n. 6, 1452, 94 L.Ed.2d 615 (1987). Instead, the Court has held that Title VII claims are subject to a different legal standard than equal protection claims. *Id.; see also Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437-38 (10th Cir.1990). Thus, the court appears to have relied on an erroneous legal standard in resolving appellant's Title VII claim. While this error does not affect the outcome here-because the court holds that appellee's affirmative action plan passes its strict scrutiny-the court's approach is clearly at odds with Supreme Court precedent.

Supreme Court, U.S.
FILED
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(2)

No. 91-870

In The

Supreme Court of the United States

October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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(4)

SUPPLEMENTAL APPENDIX

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

(CLOSED CIVIL CASE)

ALAN PEIGHTAL, Plaintiff, vs. METROPOLITAN DADE COUNTY, Defendant.	)	CASE NO. 86-2350-CIV-HASTINGS FINAL JUDGMENT

THIS CAUSE came for trial before the Court sitting without a jury, and the issues having been duly heard and a decision having been duly entered, it is hereby

ORDERED AND ADJUDGED that the plaintiff ALAN PEIGHTAL take nothing, that the action be dismissed on the merits and defendant METROPOLITAN DADE COUNTY shall henceforth go without day.

DONE AND ORDERED at Miami, Florida, this 25 day of April 1988.

/s/ Alcee L. Hastings
UNITED STATES
DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:
A. Kapetanakis, Esq.
J. McInnis, Asst. Dade County Attorney

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

ALAN ANDREW PEIGHTAL, Plaintiff, vs. METROPOLITAN DADE COUNTY, Defendant.	CASE NO. 86-2350-CIV-HASTINGS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried to the Court, sitting without jury, and after considering the stipulation of the parties, testimony of witnesses, and the documentary and physical evidence, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT[1]

1. Plaintiff, Alan Andrew Peightal, is a citizen of the United States and a resident of Dade County, Florida.

2. Defendant, Metropolitan Dade County (County), is a political subdivision of the State of Florida.

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[1] To the extent that the findings of fact are interpreted as conclusions of law, they are so considered. To the extent that the conclusions of law are interpreted as findings of fact, they too are so considered.

3. Plaintiff is a white male and brings this employment discrimination action alleging that he was not hired as a firefighter because of his race. Plaintiff further contends that the County failed to properly recognize his veteran status during the employment process.

4. On October 18, 1983, Alan Peightal applied for a position as a firefighter with the Metro-Dade Fire Department (Department) during the Department's 1983 recruitment. In November, 1983, he took the firefighter's entrance examination and earned a score of 98.25. His test result placed him in the 28th percentile among those applicants taking the examination.

5. Those candidates that met certain criteria[2] and received passing scores on the firefighter's examination were placed on an eligible list. Because Alan Peightal had met all of the requirements, he was placed on this list.

6. As a result of the Department's recruitment from that 1983 examination eligible list, the following candidates were hired: 23 White males, 16 Black males, 24 Hispanic males, 12 White females, 5 Black females, 4 Hispanic females. Plaintiff's Exhibit No. 7a. Alan Peightal was not hired.

7. On March 20, 1986, Alan Peightal filed a charge with the Equal Employment Opportunity Commission (EEOC). On August 12, 1986, the EEOC determined that the decision not to hire Alan Peightal was taken pursuant to the an [sic] affirmative action plan which had been adopted by the Department. Plaintiff was issued a

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[2] The basic requirements include a high school degree or its equivalent and a valid driver's license.

right-to-sue letter on this basis, and this action was thereafter commenced.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. §§1331, 1343 in that this action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*; 42 U.S.C. Sec. 1983; the Veterans Preference Act, 5 U.S.C. Sec. 1313; and the Vietnam Era Veterans Readjustment Act of 1974.

2. This Court has jurisdiction over the parties.

3. The County is an employer within the meaning of 42 U.S.C. Sec. 2000e(b).

4. The County has the authority to implement an affirmative action plan. *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984).

5. The burden is on the plaintiff in a "hiring case" to establish a prima facie case of racial discrimination. In a typical racial discrimination action, plaintiff is required to demonstrate: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As the *McDonnell* Court noted, this framework should be modified to accommodate different employment discrimination contexts. *Id.* at 802 n. 13.

6. Thus, a "reverse discrimination" case, like the case *sub judice*, necessitates that modifications be made to the *McDonnell* framework.[3] Accordingly, a "reverse discrimination" plaintiff must show: (i) that he applied for an available position; (ii) for which he was qualified; and (iii) that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012, 1017 (D.C.Cir. 1981); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985). These are the four elements of a typical reverse discrimination claim.

There is however a somewhat different standard that has been utilized in this Circuit. It requires the plaintiff to demonstrate that: (i) he is white; (ii) he was well qualified for the job he applied for; (iii) he was not hired; and (iv) a person of another race was hired. *Walters v. City of Atlanta*, 610 F.Supp. 715 (N.D. Ga. 1985) *aff'd in part, reversed in part* 803 F.2d 1135 (11th Cir. 1986) (remanded for a recalculation of back pay damages). Although *Walters* was affirmed, the correctness of the reverse discrimination standard was not properly presented to the Court, and consequently, the Eleventh Circuit did not expressly adopt nor discuss the four factors utilized by the district court. Its approval, if any, of the criteria was *sub silentio*,

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[3] With respect to the first prong of the *McDonnell* test, membership in a racial *minority*, it should be noted that a white male has an equal right to bring a Title VII action as does any other person. "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standard as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976).

and therefore, on that basis the *Walters* standard is not binding on this Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

Moreover, to the extent that the *Walters* standard embraces the proposition that the hiring of a minority employee, without more, justifies an inference of prejudice against job applicants in the majority, the test is contrary to existing case law. "The aim in both [majority and minority] cases is to determine whether the plaintiff 'was rejected under circumstances which give rise to an inference of unlawful discrimination.' " *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C.Cir. 1986), *citing Texas Department of Community Affairs v. Burdin*, 450 U.S. 248, 253-54 (1981). This Court's reading of *Walters* impermissibly allows the burden of production to shift to the employer because none of the elements require a plaintiff to establish any circumstances from which to infer the existence of discrimination. Consequently, an employer would be faced with the prospect of continually having to defend each affirmative action decision thereby creating a "significant disincentive for voluntary action" on his behalf. *Johnson* at 1451 n.8 (citations omitted).

At first blush, even the *Parker* standard may appear to have a similar burden shifting effect. The *Parker* court recognized this very problem and pointed out that it was not suggesting "that a lawful affirmative action program would in itself constitute suspicious circumstances sufficient to justify an inference of discriminatory intent under *McDonnell Douglas*."

Parker, 652 F.2d at 1017 n. 9. Hence, the *Parker* criteria requires a plaintiff to make an initial showing sufficient to raise an inference of discriminatory intent, as demonstrated by circumstances *other than* the mere existence of an affirmative action plan. The *Walters* test would only require the plaintiff to show that someone of another race was hired, and on that basis it cannot be followed. Historically, white males have not been hindered in the work place because of their race or sex and "are required to offer other particularized evidence". *Bishopp* at 786.[4]

7. Thus, under *Parker*, a plaintiff need not present direct proof of discrimination because "background circumstances" will suffice. 652 F.2d at 1018. Once the plaintiff establishes these elements, the burden of production immediately shifts to the employer to articulate a legitimate nondiscriminatory reason for his decision. *Johnson* at 1449; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

8. The "existence of an affirmative action plan provides such a [legitimate nondiscriminatory] rationale." *Johnson*, 107 S.Ct. at 1449. Although, ordinarily an employer feels compelled to present evidence in support of the plan. *Id.*

9. Once the employer articulates a legitimate nondiscriminatory reason for its decision, the burden shifts

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[4] The more difficult question, and one which was not squarely presented to the Court, is whether the existence of an affirmative action program in and of itself is a factor in the establishment of the plaintiff's prima facie case. The language in *Parker*, 652 F.2d at 1017 n. 9, suggests not. Nonetheless, the Court leaves that decision for another day.

back to the plaintiff to establish that the County's justification is merely a pretext and the affirmative action program is invalid. *Id.* Although the employer may have presented evidence to avoid the charge of pretext, the burden of proving the invalidity of the plan remains on the plaintiff. *Id.*

10. An affirmative action plan is valid if (1) it is designed to alleviate an existing " 'manifest imbalance' that reflected underrepresentation of [minorities] in 'traditionally segregated job categories' "; *Id.* at 1452 (citation omitted); (2) it does not "unnecessarily trammel the rights of [non-minorities] or create an absolute bar to their advancement"; *Id.* at 1455; (3) it is a temporary measure intended to *attain*, rather than *maintain*, a balanced work force. *Id.* at 1456.[5]

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[5] The County would impose one other factor to be considered in the assessment of the validity of an affirmative action plan: that the plan does not result in the hiring of unqualified applicants. *See* Pretrial Memorandum at 4. This factor first appeared in *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981), at a time when there was little guidance in the area from the Supreme Court.

Johnson, however, upheld employment decisions made pursuant to an existing affirmative action plan. The Court's analysis in *Johnson* of the validity of affirmative action plan was guided by its decision in *United States Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Yet, neither *Weber* nor *Johnson* specifically set this factor apart. In fact, the Court in *Johnson* discussed employee qualifications only under its analysis of the "manifest imbalance" requirement. *Johnson*, at 1454. It is clear this factor should not be hoisted to the position of a separate requirement. Rather, it is only one of several considerations, in light of calculated imbalances, used to evaluate an

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11. In determining the existence of an imbalance that would justify the consideration of the race or sex of applicants, it is proper to compare "the percentage of minorities [ ] in the employer's work force with the percentage in the area labor market or general population" for positions that require no special expertise. *Johnson* at 1452. Because entry-level firefighters are not required to possess any specialized skills,[6] a comparison between the Fire Department's work force and the labor market is appropriate.

12. In this case, the Department had reviewed the composition of its work force and found women, blacks and Hispanics to be substantially underrepresented in proportion to the labor market. *See* Plaintiff's Exhibit No. 9. On this basis, the Department adopted an affirmative action plan. Although progress had been made, minorities remained underrepresented in the Department and thus the plan was still in effect when Alan Peightal became eligible. The hiring goals, however, were adjusted yearly[7] and goals were adopted for 1983. *See* Plaintiff's

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affirmative action plan. Moreover, this factor is primarily applied when an affirmative action program is challenged on constitutional, and not statutory, grounds. *See Paradise v. Prescott*, 767 F.2d 1514, 1531 (11th Cir. 1985) (discussing various types of constitutional tests employed by the courts).

[6] Although the firefighter position is described as "specialized work in the protection of life and property", Plaintiff's Exhibit Composite No. 16, there are no specialized skills per se which must be possessed in order to obtain the position.

[7] On direct examination,f [sic] Ex-Fire Chief Edward Donaldson, was questioned about the Department's definition of "hiring goals". He stated:

(Continued on following page)

Exhibit No. 7. Applicants from the eligible list were contacted in accordance with the goals.

13. The Department's plan is similar to the plan upheld in *Johnson* in that it takes into distinction the qualifications of the applicants and does not call for "mere blind hiring by the numbers". *Id.* at 1454. Instead, qualified applicants were categorized according to their particular majority or minority status *and* prioritized by examination scores. The available entry-level firefighter positions were then filled in accordance with the Department's goals aimed at correcting the existing imbalance

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> Well, I am not sure how you are using the term. We determined that a certain or set amount of females or somebody should be hired. A goal simply said that if we needed one hundred persons, and it is apparent we have mostly white males, and we look at the work force around us in percentages, we would attempt to establish some relationship between those things. We would look at the available candidates and we would attempt to set some goals for hiring that were reflective of the candidate list that we had available to us.
>
> There would be no reason, for example to have a goal of fifteen females if there are only four on the list. So, it was a fluid kind of thing. Year to year, we would balance it again. The objective was to work towards some time in the future when our work force make-up would be reflective of our community, and then we would stop that process, hopefully, and the exam would be validated and it would all work together.

Thus, the Department's plan was both remedial and temporary in nature.

and only by the qualified applicants after categorization from the eligible list.

14. The flexibility of the plan and the yearly adjustments made to it demonstrate that it utilized permissible "goals" and not "quotas". Contrary to plaintiff's suggestion, the plan does not dictate the strict numerical hiring that is characteristic of a quota. In fact, the eligible applicants were insufficient to fulfill all of the Department's hiring goals. *See* Plaintiff's Exhibit 8.

15. Thus, the plan's aim was to alleviate the existing imbalance reflected by the underrepresentation of women and minorities in the County's firefighter positions. Had the hiring taken place strictly on the basis of examination scores, the Department would have actually contributed to the underrepresentation.[8]

16. The plan does not "unnecessarily trammel" the rights of majority applicants. In fact, for the period of 1983-85, only one more Hispanic male was hired than were white males (24 versus 23). Plaintiff's Exhibit No. 7a. Overall, white applicants were hired in greater numbers than their minority counterparts. Finally, the plan was not permanent, but was designed only as a temporary measure. *See supra* note 7.

17. To the extent that Plaintiff purports to argue that Hispanics are not a class entitled to protection against discrimination under an affirmative action plan, that

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[8] For example, an examination of the eligible list discloses that of the top 100 qualified applicants on the list, only six were Hispanic, none were Black, and only one was a Female. Plaintiff's Exhibit No. 12.

claim is also without contention. *See U.S. Paradise*, ___ U.S. ___, 107 S.Ct. 1053, 1074 (1987) (affirmative action plan may "remedy unlawful treatment of racial or ethnic groups"); 42 U.S.C. §2000e(2) (discrimination prohibited on basis of individual's "race, color, religion, or national origin").

18. Plaintiff also challenges the County's definition of "Hispanic" as being both underinclusive and overinclusive. According to Plaintiff, the County's definition is underinclusive because certain Latin Americans, for example, would be excluded. He argues the definition to be overinclusive because it includes persons who are decendents of Hispanics. The County, however, utilizes the definition provided by the EEOC. This definition has survived constitutional scrutiny, *Espinoza v. Farrah Manufacturing Co.*, 414 U.S. 86 (1973). Further, the EEOC definition of "national origin" includes a person's "ancestor's place of origin." 29 C.F.R. §1606.1 (1987). Thus, plaintiff's theory does not support recovery on this claim.[9]

19. Finally, Plaintiff's argument that his veteran status was not considered is without merit. A perusal of the eligible list reveals that his veteran status entitled him to a score enhancement of 5 points. In fact, the list indicates

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[9] Plaintiff also argued that the County's hiring process is impermissible in the sense that no one verifies the accuracy of an applicant's declaration that he or she falls in a minority category. In other words, if an applicant states that he is of Hispanic decent, this information is not verified for purposes of employment. The Court unwilling to hold, on the basis of this contention alone, that such conduct is tantamount to impermissible discrimination.

that all but five applicants who scored higher than Plaintiff were veterans that received similar score enhancements. Plaintiff's Exhibit No. 12.

III. CONCLUSION

Plaintiff has failed to present evidence suggesting that the decision not to hire him was the result of discrimination by the County. In short, plaintiff has failed to meet its burden of invalidating the County's affirmative action program. Therefore, it is hereby

ORDERED AND ADJUDGED that judgment be entered in favor of the defendant, METROPOLITAN DADE COUNTY.

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall submit memoranda of law on the issues of costs and attorney fees within ten (10) days from the date of this Findings of Fact and Conclusions of Law.

Judgment to be entered accordingly.

DONE AND ORDERED at Miami, Florida, this 25 day of April 1988.

/s/ Alcee L. Hastings
UNITED STATES
DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:
A. Kapetanakis, Esq.
J. McInnis, Asst. Dade County Attorney

Supreme Court, U.S.
FILED
JAN 2 1992

(3)

No. 91-870

In The

Supreme Court of the United States

October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on September 4, 1991, and reported as *Peightal v. Metropolitan Dade County,* 940 F.2d 1394 (11th Cir. 1991).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is generally accurate but leaves out several facts important to an understanding of this dispute. The Respondent, Metropolitan Dade County (the County), offers the following additional information in an effort to clarify the issues raised by the petition.

While Petitioner, Alan Peightal, correctly states that he was denied employment as a County firefighter as a result of the Fire Department's affirmative action plan, he has ignored much of the evidence produced in support of the plan. Most importantly, he has ignored evidence of the Department's history of discrimination against minorities and women.

Contrary to the Petitioner's representation, the County's affirmative action plan for hiring entry level firefighters was not based solely upon a statistical comparison of the Department's makeup in 1983 to the general population in the local

area. Before adopting the plan, the County also considered the Fire Department's 20 year history of hiring, a history that reflects a longstanding underrepresentation of blacks, Hispanics and females. In 1965, the Department employed 121 firefighters, all but one of whom were white males, compared to an available labor force that was 69% white, 15% black, 16% Hispanic and 52% female. Defendant's Exhibit 9; R2 at 109-10. By 1975, the Fire Department had grown to 499 firefighters, 89% of whom were white, 8% black, 3% Hispanic and none female, compared to an available labor force that was 52% white, 16% black, 32% Hispanic and over 50% female. *Id.* By 1983, when the affirmative action plan at issue was implemented, the number of firefighters in the Department had increased to 921, 74.9% of whom were white, 11.8% black, 13.8% Hispanic and only 1.3% female, compared to an available labor market that was 47% white, 17.3% black, 35.8% Hispanic and over 50% female. *Id. Peightal v. Metropolitan Dade County,* 940 F.2d 1394, 1396 (11th Cir. 1991).[1]

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[1] In a dissenting opinion, Chief Judge Tjoflat questioned the County's use of general population statistics to set its affirmative action goals because such statistics do not reflect the percentage of the population that is actually qualified to be firefighters. The majority opinion found such statistics appropriate because applicants for positions as County firefighters do not need to possess any specialized skills. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, ___, 109 S. Ct. 706, 725, 102 L.Ed.2d 854, ___ (1989); *Teamsters v. United States,* 431 U.S. 324, 337-38, 97 S.Ct. 1843, 1855-56, 52 L.Ed.2d 396 (1977). The appellate court has remanded the matter to the district court for the purpose of, among other things, clarifying the statistical basis for the County's affirmative action plan.

The Petitioner's statement also ignores the efforts the County made to increase the number of minorities and women working at the Fire Department before it decided to begin hiring in accordance with the goals of its affirmative action plan. The Department had a longstanding recruitment program aimed at attracting minorities and females to the Department R2-106; Def. Exh. 1 at 9. The Department established a special recruitment team for the purpose of making presentations at local colleges, high schools, job fairs and career development programs. *Id.* The recruitment program also provided for meetings with local minority and female organizations to inform them of the Department's employment opportunities. *Id.* The Department also conducted special activities aimed at attracting minorities, including a summer youth employment program. *Id.* at 10. A group of the Department's black firefighters, known as the "Progressive Firefighters Association" volunteered to conduct an outreach program to the black community. The Association's activities were included as part of the Department's overall recruitment program. *Id.* at 9.

Despite these efforts, the Department was not able to attract a sufficient number of minority and women applicants to make up for the historical underrepresentation of these groups. In fact, if the Department had not adopted the affirmative action hiring goals contained in the 1983 affirmative action plan, and had instead hired strictly in accordance with ranking on the eligibility list, no blacks, no women and only six Hispanics would have been hired. R1-36-102 n.8; Plaintiff's Exhibit 8.

The Petitioner's statement also ignores the limited purpose of the Department's eligibility list. Although the list ranked candidates on the basis of their score on a

written examination, performance on the test was not the only criterion the Department used in making its hiring decisions. After passing the test, candidates were required to submit to an oral interview, pass a physical capability test and undergo a complete medical examination. The Department's concern at the recruitment level was to insure that all candidates who were offered positions met these basic requirements, not that it hire only those persons who scored highest on the written examination.

The Petitioner's statement also ignores the manner in which the Department's affirmative action goals were actually used. The goals were not fixed, inflexible mandates for the hiring of a set number of blacks, Hispanics or women. The process was designed to ensure that the Department did not hire any unqualified candidates, whether minority, female or otherwise. R2-113. The plan set flexible standards based on a realistic assessment of what the Department could actually attain given the actual number of persons who applied and the openings available. R2-112, 113. If the recruitment process failed to produce a sufficient number of qualified minority or female candidates, the Department remained free to fill any remaining vacancies with qualified nonminority male candidates. R2-113. For example, the Department set a goal of hiring 37 Hispanics but ended up hiring only 28. Deft. Exhs. 7, 8.

Finally, the Petitioner's statement unduly exaggerates the effect of the lower court's actual holding. The Eleventh Circuit did not hold that the County's plan is valid against all challenges, only that it meets the requirements of Title VII. The Eleventh Circuit has remanded the matter for the district court to consider the affirmative

action plan's validity under the Fourteenth Amendment in light of this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Rather than wait for either the district court or the court of appeals to finally decide the validity of the Fire Department's affirmative action plan, the Petitioner has decided to seek this writ of certiorari.

REASONS FOR NOT GRANTING CERTIORARI

The Petitioner has asked the court to accept certiorari for the purpose of deciding whether the Eleventh Circuit properly applied this Court's decision in *Croson* to his claim that the County's affirmative action plan violates the equal protection clause of the Fourteenth Amendment and whether the *Croson* standard applies to challenges of affirmative action plans under Title VII. The Petition must be rejected because the Eleventh Circuit has not yet had an opportunity fully to consider the impact of the *Croson* decision on the County's affirmative action plan and has remanded the matter to the district court for just this purpose. While the lower court has issued a final determination that the County's plan complies with Title VII, that decision will be moot if after remand the Eleventh Circuit ultimately determines that the County's plan does not meet constitutional standards. The procedural posture of this case makes acceptance of certiorari at this time inappropriate.

I.

CONSTITUTIONAL CLAIMS

THE COURT SHOULD NOT ACCEPT CERTIORARI BECAUSE THE LOWER COURT'S DECISION TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF *CROSON* PROVIDES ALL THE RELIEF THE PETITIONER CAN REASONABLY EXPECT.

The County does not disagree with the Petitioner's suggestion that the law concerning affirmative action by public employers is in need of clarification. Unfortunately, this case is not presently in a posture that would allow the Court to clarify the law. This action was filed in November 1986 and tried in January 1988, nearly a year before this Court issued its decision in *Croson*. In recognition of the importance of the *Croson* decision and the intensive factual evaluation upon which affirmative action plans depend, the Eleventh Circuit has remanded this matter to the district court for reconsideration. If the Petitioner is correct in his assertion that the County's affirmative action plan does not meet the requirements of *Croson*, he will have a complete opportunity to present his position to the district court, and should the district court rule against him, to the Eleventh Circuit on appeal. No harm can come to the Petitioner from the Eleventh Circuit's decision to remand this matter for the sole purpose of allowing both the Petitioner and the County to have a complete opportunity to present their positions in light of *Croson*'s requirements.

There is nothing more the Petitioner can legitimately expect to gain from this Court's granting certiorari at this time. Should the Court accept certiorari, the most natural result would be for this Court to do exactly what the

Eleventh Circuit did – remand the matter to the district court for reconsideration in light of *Croson*. In fact, a number of cases tried prior to *Croson* and on appeal after the issuance of that opinion were remanded for precisely that reason. *See, e.g., Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 971 (6th Cir. 1991); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 767 (11th Cir. 1991); *Long v. City of Saginaw*, 911 F.2d 1192, 1202 (6th Cir. 1990); *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 591 (7th Cir. 1989).

As much as the County would like to see a final resolution of this longstanding dispute and to aid in the clarification of the law regarding affirmative action, this case is not presently in a posture to allow such a resolution. As Eleventh Circuit Chief Judge Tjoflat stated in his concurring and dissenting opinion:

> [I]t [is] best that we remand the appellant's equal protection claim to the district court so that it may decide the merits of this claim. On remand, the district court, which previously resolved this case without the benefit of *Croson*, will be able to analyze the relevant facts extensively. In this way, we ensure that appellant's claim receives full and fair adjudication.

940 F.2d at 1411 Because nothing more can be gained from the grant of certiorari than what has already been ordered by the Eleventh Circuit, acceptance of certiorari at this time would be a waste of this Court's valuable resources.

II

TITLE VII CLAIMS

A. THIS COURT'S NEED TO CONSIDER THE PETITIONER'S TITLE VII CLAIM MAY BE MOOTED BY THE REMAND OF HIS CONSTITUTIONAL CLAIM.

By a two to one margin, the Eleventh Circuit concluded that the County's affirmative action plan is valid under Title VII. The dissenting judge would have preferred that the Title VII claim be remanded along with the equal protection claim for reconsideration in light of *Croson*. While a majority of the court chose not to remand the Petitioner's Title VII claim, the remand of the equal protection claim may well dispose of any of the Petitioner's remaining arguments.

As a public employer, the County's affirmative action plan is subject to review both under the equal protection clause and Title VII. While the County certainly welcomes the Eleventh Circuit's decision that its affirmative action plan meets Title VII's requirements, it recognizes that the appellate court's decision does not finally resolve the plan's validity. If, as the Petitioner insists, the plan fails to meet the requirements of the equal protection clause, as outlined in this Court's opinion in *Croson*, the plan will still have to be struck down. If the district court and the Eleventh Circuit ultimately reject the Petitioner's constitutional arguments, he will then have an opportunity to seek certiorari from this Court with a complete record and the benefit of the lower courts' final decisions. The posture of this case may be completely different after the lower courts have had an opportunity to finally resolve the matter. Acceptance of certiorari at this time would be premature.

B. THIS COURT HAS ALREADY DETERMINED THAT AFFIRMATIVE ACTION CLAIMS UNDER TITLE VII ARE GOVERNED BY A DIFFERENT STANDARD THAN SUCH CLAIMS UNDER THE EQUAL PROTECTION CLAUSE.

The Petitioner asks this Court to accept certiorari to review the Eleventh Circuit's conclusion that the County's affirmative action plan meets the requirements of Title VII on the ground that the court applied a different test to his Title VII claim than it did to his equal protection claim. The Petitioner's request is based entirely upon the mistaken assumption that this Court has not drawn any distinction between Title VII and equal protection challenges to public employers' affirmative action plans. In fact, this Court has made clear that Title VII's requirements for affirmative action are not identical to those of the Constitution.

Contrary to the Petitioner's assertion, the issue of whether affirmative action claims should be treated differently under Title VII than under the Constitution is not one of first impression for this Court. In fact, this Court has specifically rejected the argument that public employers' affirmative action plans are governed by the same standards under Title VII as under the Constitution. In *Johnson v. Transportation Agency,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), the Court stated:

> The dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore shall be governed by *Wygant* [*v. Jackson Board of Education,*

> 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)]. . . . While public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, 'Congress expressly indicated the intent that the same Title VII principles be implied to governmental and private employers alike.' *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14, 97 S.Ct. 2720, 2728 n.14, 53 L.Ed.2d 786 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

Id. at n.6. *See, e.g., Cunico v. Pueblo School District*, 917 F.2d 431, 437 (10th Cir. 1990) (Relying upon Johnson, the court stated that "the level of proof necessary to justify the consideration of race in an employer's hiring practices . . . differs depending on whether the challenge invokes the equal protection clause or Title VII."); *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989). As Chief Judge Tjoflat stated in this case:

> Were we writing on a clean slate, I might agree with this approach for analyzing Title VII claims involving the affirmative action plans of public employers. The Supreme Court, however, explicitly has rejected the argument that 'the obligations of a public employer under Title VII must be identical to its obligation under the Constitution.' Instead, the Court has held that

> Title VII claims are subject to a different legal standard than equal protection claims.

940 F.2d 1394, 1412 at n.2 (citations omitted).

CONCLUSION

The County is no less interested in seeing this case finally resolved than the Petitioner. The procedural posture of this case, however, makes acceptance of certiorari inappropriate at this time. The matter has been remanded for additional factual analysis in light of this Court's decision in *Croson*. The remand cannot harm the Petitioner in any fashion, but acceptance of certiorari at this time will preclude the parties from fully presenting their respective positions. The County, therefore, respectfully urges the Court to deny certiorari.

Respectfully submitted,
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